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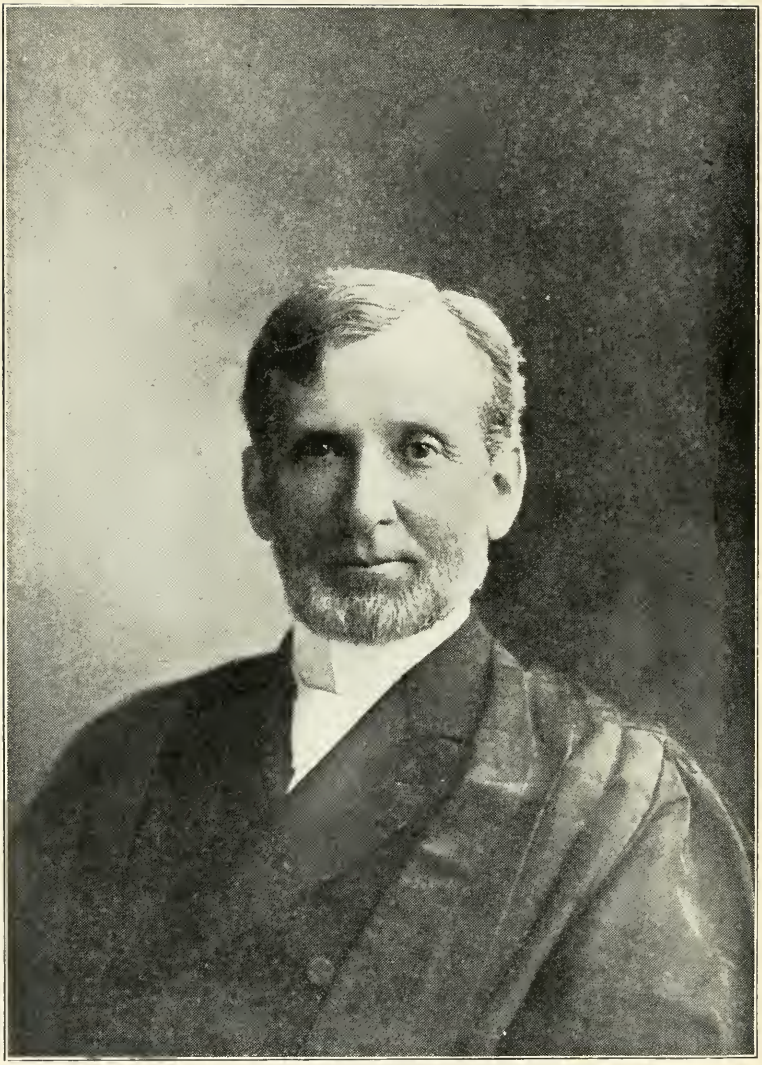

J. McKENNA

UNIVERSITY OF CALIFORNIA
SOUTHERN BRANCH

CYCLOPEDIA OF LAW

# A Short Treatise on

# Public International Law

OR

## THE LAW OF NATIONS

CONTAINING ALSO

SOME REMARKS ON LEGAL ETHICS
AND PRACTICAL SUGGESTIONS
TO YOUNG LAWYERS

VOL. XII

EDITOR IN CHIEF
HON. CHARLES E. CHADMAN, LL.B., LL.M., LL.D.

*Assisted By*
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# PREFACE.

In the early part of the year 1899, the first book of The Cyclopedia of Law Series was published by the author with considerable trepidation as to its reception by the public, and more fear and doubt as to the feasibility of thoroughly encompassing the field of jurisprudence in the twelve volumes contemplated to form such Series. Now that the last of the twelve volumes is about to go to press, and looking backward, the task which at first seemed so arduous and doubtful, seems neither difficult nor unpromising.

It has been argued that no one but a lawyer, or one expecting to be a lawyer would read a book, or series of books, devoted to the principles of legal science. The kindly reception of the Cyclopedia of Law Series by the general public, regardless of the present calling of the readers, indicates that there is a demand for such books outside of the field of professional instruction, and that if the subject of jurisprudence is made presentable and freed from the unnecessary verbiage and circumlocution of the average legal text-book, that there are many people, aside from students and lawyers, who will gladly give some time to the consideration of this branch of education.

There are various reasons why a series of books devoted to stating and explaining the elements and basic principles of American law should be well received

to-day, especially, if they are not stuffed with endless matters which are of little use except to take up space. Thus, there never was a time when there were more young, ambitious and aspiring minds, who like Lincoln, desire to climb to higher spheres of usefulness by educating their minds, and who must do this, if at all, along with other labors by utilizing spare moments. Again, there is more need under our scheme of government, in which the organization and conduct of the government rests primarily upon the whole people, for each citizen to know something of the history of the laws and fundamental regulations upon which all civilized states and governments, as well as societies, are based. We believe, therefore, that there cannot be a more useful and essential course of reading and instruction to fit a man for the active duties of life than that which covers the field of jurisprudence.

Having now completed the presentation of the rules and general principles of the various branches of law, it is the author's present intention, as soon as practicable, to supplement the present series of books by a number of "Case Books," which will seek to show the application of the principles of law to actual controversies, as exemplified in the leading cases as decided by the highest courts in America and England. When this task shall have been completed, it is believed that most any person with the ability to read, may at slight cost secure a fair understanding of legal science. *Charles E. Chadman.*

Conneaut, Ohio, June 9, 1906.

# PUBLIC INTERNATIONAL LAW.

## CHAPTER I.

### EARLY HISTORY AND WRITERS ON INTERNATIONAL LAW.

Sec. 1950.* GREEKS KNEW NOTHING OF INTERNATIONAL LAW.—Notwithstanding the advanced civilization of the Greeks in the arts and sciences they contributed little or nothing to the subject of international law. In their dealings with other nations they were typical barbarians. Captives taken in their wars were either killed or made slaves. Piracy was a regular, if not an honorable profession. They had some notion of international rules as they would not make war unheralded, that is, without giving notice. Among themselves that had a league called the Amphyctionic Council, the purpose of which was to affect the peaceful settlement of difficulties arising among its members. But neither Plato in his "Republic," not Aristotle in "Politics," give any space or thought to the subject now known as international law.

Sec. 1951. INTERNATIONAL LAW UNDER THE ROMANS.—The early Romans were as great foes to civilization as the Greeks. Slave dealers travel-

*This book is No. 12 of The Cyclopedia of Law, the former 1,949 sections comprise the first eleven books of the Series.

ed with the victorious armies; and all foreigners coming into the Roman Forum were, under the theory of the law, slaves, and had no method of protection against any grievances which befell them.

Later the Romans developed in their *Jus Gentium* (Law of Nations) something akin to international law. The *Jus Gentium* was the law applicable to controversies between Romans proper and the citizens of Latium, or surrounding tribes or nations, when tried in Rome. And the same sort of an inter-tribal law developed among the German tribes, called the *Jus Commune Germanica.*

The Romans also had a law governing the arrangements for making war, called the *Jus Feciale,* and a Fecial College, composed of a certain number who were to investigate and decide whether war should be declared or not, and their procedure was governed by certain rules. If war was made it was always heralded.

The Roman law proper was called the *Jus Civile* (Civil Law) and has had considerable influence on the present international law, by reason of being spread over Europe at the fall of the Roman Empire, and becoming a part of the law of every modern nation. The Civil Law was adopted by the ecclesiastical courts and admiralty courts in England, and enters as a factor in equity and commercial law. It is also the basis of the law in the State of Louisiana.

Sec. 1952. EXPLANATION OF THE ROMAN CIVIL LAW.—The Roman Civil Law originated with

the XII Tables as early as 449 B. C., and these were supposed to have been framed by legislators who went abroad and selected the best laws from the various nations and put them into a very simple and concise system.

By the time of Emperor Augustus the body of the law had developed greatly and was composed of three classes or factors. These were: 1. *Responsae Prudentum,* or the replies or decisions of learned men, which had been collected and formed a part of the law. 2. Decrees of the Senate, it being one of the law making powers, its decrees had the force of public laws. 3. *Plebiscita,* or common statutory law, or private law. In addition to these there was the laws of the Praetor, who on being elected published an edict in regard to the laws. These becoming very voluminous were happily summed up by a Praetor in the reign of Emperor Hadrian, and this edict was followed afterwards. In the year 169, The Institutes of Gaius in four books was published, the first law book. In the reign of Constantine, 306, the decrees of the Emperor were laws, and these decrees were codified in the Theodosian Code in 438.

Early in the reign of Justinian, about 527, he appointed a commission to revise the laws and make a new edition of them in more compact form. The result of this was the Codex, a codification of imperial decrees; The Pandects or Digest in fifty books, being a digest of the great law writers or law-givers found in over two thousand other books. For the use of

students an abridgement of these books was made, called Justinian's Institutes in four books.

It is this classical law, developed by the experience of centuries and polished by the intellects of countless sages, that spread itself over Europe at the fall of the Roman Empire, with its leading savants to inculcate it. No wonder then, that its influence is felt in the legal system of every European nation.*

Sec. 1953. CONDITIONS IN THE MIDDLE AGES.—From the fifth to the tenth century little progress was made in international law; war was waged without governing rules; hostages were slain; and shipwrecked mariners were killed or made slaves. Thus Richard Cour de Lion returning from the Crusades was imprisoned in Austria. It was a time of lawlessness and brutality; piratic expeditions were fitted out to plunder defenceless cities, and this was one of the reasons that persons shipwrecked were dealt with so harshly, as they were considered as pirates who would burn and murder if they had the power.

Sec. 1954. AMELIORATING INFLUENCES FROM THE TENTH TO THE SIXTEENTH CENTURY.—From the tenth to the sixteenth century there were certain ameliorating influences making for the advancement of law and order between nations. These were:

1. Chivalry. This was based upon an advanced

*See, Maine's Ancient Law; Gibbon, Dec. & Fall, Chapter 44.

system of morals and conduct. All knights were in duty bound to be devout or religious; to be humane towards prisoners; never to commit slaughter in cold blood; to be faithful to their word of honor; and to recognize every member of their order as a brother regardless of nationality. From this sprang the custom of paroling prisoners, the declaration of war by heralds, and sometimes even the fixing of the time and place of battle.

2. The unity of Christian Europe caused by the Crusades. By Christian Europe at that time was meant all of Europe save Russia and Turkey. The Crusades were a series of wars started by the so-called Christian nations to rescue the birth place of Christ from the Mohammodans, who were regarded as heathens. Prior to the Crusades the various nations were continually at war, but their co-operation in the Crusades for a time put an end to these and caused their working together for a common end. Instead of being enemies, they began to look upon each other as brothers, allies and equals.

3. The treaties and commercial relations ensuing from their close connection. Prior to the Crusades the treaties were commonly broken, but during their continuance they were usually respected, and this paved the way for further commercial treaties and relations. The feudal lords were poor in money and had to borrow from the Italian bankers. So the shipping for the Crusaders was furnished by the maratime cities, and in these various ways commercial intercourse was stim-

ulated, and international rules and regulations began to appear.

4. The humane influence of Christianity and the restraining influence of the clergy over the kings and princes of Europe. The church and clergy used their influence to get the various potentates not to battle on Sunday, and then to refrain from war for certain periods of time. These restraints were only operative as against Christian nations, the infidels, or heathen nations were under a ban, and it was considered illegal to make an alliance with them even for a good purpose,—a view shared by Lord Coke, and Grotius and others.

5. The centralization of power in the Pope and in the Emperor, or head of the so-called Holy Roman Empire. The Pope had the greatest of power, he claimed to be the Vice-gerent of God on earth in spiritual matters, while the Emperor of the Holy Roman Empire was God's Vice-gerent in temporal matters. But frequently these brothers failed to agree as to their respective spheres and each would try to overthrow the other.* Sometimes one was in the ascendant and sometimes the other. At times the Pope was made the arbiter of questions arising between the crusading nations, and at others these international questions were submitted to the Emperor. As a result there was more or less concord between the Chris-

*One of the chief items of dissension between the Pope and the Emperors was the right to appoint bishops. This was settled by the concordat of Calyxtus.

tian nations of Europe, with commercial relations and treaties between them, and the arbitration of international questions.**

Sec. 1955. STATUS OF INTERNATIONAL LAW IN THE SIXTEENTH CENTURY.—In the sixteenth century diplomatic relations, treaties, alliances, and commercial codes were everywhere being established. And the events tending to help along these international relations were:

1. The strife between Francis I, of France, and Charles V, of Germany, involving at times nearly all of the nations of Europe.

2. The great commercial and maritime developments in Spain, Holland, and England. It being a period of discovery, exploration and colonization. In this period Spain conquered Peru and Mexico and colonies were being founded in India and America. In their discoveries and explorations these rival nations came into conflict with one another. These conflicts lead to negotiations tending to settle points of difference, as a result of which diplomacy became an art practiced and fostered by all nations. To look after their various interests ambassadors were sent, and resident ministers were appointed at each of the principal courts. Whether the honor of sending the first minister belongs to Spain or France is in dispute. International relations and intercourse in a modern sense of the term may be said to date from the sixteenth century.

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**See Bryce's "Holy Roman Empire," Ch. 15; Hallam's Middle Ages, Part 2, Ch. 7.

Sec. 1956. IN 1625 THE FIRST WORK ON INTERNATIONAL MATTERS APPEARED, CALLED "PEACE AND WAR" BY GROTIUS.—In 1625 Hugo de Groot, a native of Holland, and later a diplomat to England, and by reason of political and religious views an exile, having escaped from prison to France, wrote his great work entitled "De Jure Belli et Pacis," (The Law of Peace and War). This book is regarded as the foundation of the science of international law. Grotius, which is the latinized form of his name "Groot," while living in France was appointed ambassador to Paris by the Swedish queen. It being customary to appoint accomplished men of other nations as such representatives.

About this time Europe was worn out with wars and the people were becoming awakened to the problem as to the necessity and justice of waging war. Some persons came to the conclusion that wars were never justifiable under any conditions, and the sect known as Quakers resulted. Grotius started out to ascertain whether or not war was justifiable in any case, and in doing so he went back to the dawn of history to find out if the good men of all ages had been in favor of war, and finding that they were, he concluded that war must be justifiable in certain cases. That the lack of humanity exhibited in war was unjustifiable, and aimed to get certain general rules for the regulations of nations in times of war. His work, coming as it did, produced a profound impression, and did much to pave the way for the adoption of better rules for the

conduct of wars between nations. About the same time Albertus Gentius in Italy, and a Spaniard by the name of Suarer were writing along the same lines.

The only criticism on Grotius' work was the assumption that what was justified in the past should be so in the present, not making sufficient allowance for the moral and ethical growth of people under an upward civilization. But his work was a great advance and was welcomed by the people generally as containing many wholesome truths which few dared to utter, and justifies his being styled the "father of international law."

Sec. 1957. OTHER WRITERS ON INTERNATIONAL LAW.—Among the conspicuous writers on the subject of International Law, or Law of Nations as it was formerly called, may be mentioned the following:

Puffendorf, a professor of Heidelberg, who lived from 1631 to 1694, wrote a work, treating of the law as it ought to be rather than as it was.

Vattel's work was used in the days of the American Revolution, the author was a Swiss by birth and engaged in the service of the king of Saxony as a diplomat. His work was written in French, he lived from 1714 to 1767.

Bynkershoek, a writer living between 1673 and 1743, upheld the rights of neutrals on the sea against the claims of Great Britain. The first volume of Kent's Commentaries on American Law, written from

1826 to 1830, deals with the subject of International Law.

Prof. Heffter, of Berlin, is the author of a volume on the subject which is considered a very high authority.

Jeremy Bentham, and Phillimore are Englishmen who have written books treating of the subject of International Law. The latter was an English admiralty judge, and cites many historical illustrations in his work. Sir Vernon Harcourt also wrote a number of pamphlets on the subject during the American Civil war, discussing the English point of view. Other English writers are—Mannin's work on the Law of Nations; Prof. Bernard, of Oxford, who was one of the commissioners to negotiate the Alabama treaty; Traverse Twiss' Law of Peace and War; and Prof. Lorimer, of Edinburgh. A recent work by W. E. Hall, an Admirality lawyer, is an excellent work.

The French writers on the subject are Ortolan and Hortefeuille, who contend for the rights of neutrals on the sea as against the claims of Great Britain.

Calvo's work on International Law, is in three volumes, and was written in French, though the author is a South American from Peru.

Of the American writers, Chancellor Kent's first volume comes first; Judge Story's Conflict of Laws, deals with the subject somewhat; Henry Wheaton's History of International Law, and Text-book on International Law are standard works, which have been

translated into Chinese and Japanese. Wheaton was an American diplomat. There are several editions of Wheaton's work, and it has the widest circulation of any book since that of Grotius. Dr. Woolsey, of Yale College, has also written a text-book on the subject. Gen. Halleck is another American who wrote on the subject of the law of war during our Rebellion. Prof. Lieber, of the University of South Carolina, drafted a code of rules at the request of President Lincoln to be used in the Civil War. David Dudley Field, the author of the New York Code, also undertook to codify the rules of international law.

Sec. 1958. OF THE PLAN FOLLOWED BY THE WRITERS ON INTERNATIONAL LAW. —The earlier writers on international law, save Grotius, were inclined to deduct law from principle of natural or general justice rather than by an inquiry as to what the law really was. Most of the later writers, on the other hand, have sought to ascertain what the law is in practice, as sanctioned by usage, without stopping to inquire what justice would require the law to be. Phillimore and Woolsey in their treatises aim to combine the two methods.

The subject of international law is colored by the different spirit prevailing in different countries as to the rights of the nations on the sea, and the rights of neutrals, the works in each country reflecting the spirit there prevailing.

The decisions of French courts are not usually

given the weight of precedents; while in England and America a case once decided is regarded as a precedent and has great weight in deciding future cases.

## CHAPTER II.

### OF THE NATURE AND SOURCES OF INTERNATIONAL LAW.

Sec. 1959. GENERAL PROPOSITIONS ACCEPTED BY ALL NATIONS.—As a rule, all civilized nations recognize a state or nation as having certain rights and properties. These are: 1. The right to exist. 2. As being moral persons, and having a moral personality and qualities the same as an individual. 3. Having the right to exist, they have certain rights essential to existence, and each is under obligations to recognize these rights in others; hence each state has rights and obligations. 4. Being recognized as moral persons they have duties to perform, as well as rights to claim. 5. Being in relations of intercourse with each other from motives of convenience and expedience they adopt certain rules and regulations to govern such intercourse. 6. The usages more or less completely conform to the above claimed rights and obligations. And the conditions congenial to the existence of states which have grown up are by agreement, express or implied, recognized as having a certain binding force upon them. 7. As a result, we have, therefore, a basis for the exposition of the principles of international law in the assent of all civilized nations to the following principles:

(a) That states have the right to exist, and therefore have dual rights and obligations.

(b) States are moral persons, and therefore have duties and claims.

(c) States for mutual convenience agree as to certain regulations governing their intercourse.

(d) The usages approved by nations generally for the regulation of conduct towards each other have binding force.

Hence it may be said that international law is based on those moral principles which the moral sense of nations recognize as binding on them in their mutual relations. This may be said to be the ethical foundation of the subject, and includes all those rules and customs which the nations have agreed upon in the application of moral principles.

Sec. 1960. OF THE OBJECTIONS TO THE TERM "INTERNATIONAL LAW."—Prof. Austin's objections to the term "international law" lies in the fact that the word "law," according to his school of thought, designates a rule laid down for the guidance of an intelligent being, by an intelligent being having power over him to enforce it. As international rules and usages have not this binding force of positive law laid down by a sovereign power, the term is not a happy one.* The historical school of writers reject Austin's definition of law, and claim that law results from the moral principles and needs

*Austin's Jurisprudence, Vol. 1, page 38.

of a people, and is not imposed upon them by a sovereign authority, but the people select the law and the sovereign power simply ratifies the laws which the people have selected, or which have grown up by long usage and custom. They claim that law is nothing but custom; its form may be original but its substance is made up of usages from time immemorial. Thus, the common law is claimed to be thus made up.**

Fitz James Stephens, the English author on Criminal Law, thinks the term international law inexact since it applies to two kinds of law, statutory law and usages, and hence is ambiguous. Lord Coleridge thinks the term "law" thus used inexact because there is no tribunal to coerce the rules laid down, and hence there is no legal sanction which is the case in a law properly so-called. To these objections is the general one that there is no definite sanction or penalties prescribed for a violation of international laws, therefore the term "international law" is said to be inappropriate.

Sec. 1961. SAME SUBJECT—WHAT SANCTIONS EXIST FOR INTERNATIONAL LAW. —While it is true in a general sense that there is no tribunal to enforce by pains and penalties the rules of international law, and no determinate authority or executive to see to their enforcement, yet there are certain sanctions to international law which may

**Sir Henry Maine's Ancient Law.

prove quite as effectual as those prescribed for the enforcement of municipal laws. These are:

1. The self-reproach of the offending nation; that is, the punishment coming from a guilty conscience for the wilful violation of rules of right and justice.

2. The risk of being attacked by the nations whose reciprocal rights have been transgressed.

3. The punishment by Divine Providence, or the self-vindicating providence of moral laws, which all nations profess to believe. That is, that the perseverence in a policy of injustice will be eventually unprofitable and result disastrously.

4. To some extent the usages of international law are enforced by determinate tribunals, and even enforced by statutes. Thus in the case of vessels captured at sea, tried in the admirality courts, the usages of nations are followed; and in the courts of arbitration which from time to time have been agreed upon to arbitrate certain matters between nations.

Sec. 1962. SAME SUBJECT—OTHER NAMES USED TO DESIGNATE THE SUBJECT.—The criticism of the term "international law" has resulted in other terms being used or suggested to designate the subject. Thus the subject during the last century was known as the "law of nations;" Austin suggested the term "international morality," and the term "international usages" has been employed, but at present the use of the term "international law' to describe

the subject is well settled. The term was first used by Bentham.

Sec. 1963. INTERNATIONAL LAW CONSISTS OF TWO BRANCHES, PUBLIC AND PRIVATE INTERNATIONAL LAW.—International law consists of two branches; public and private. Public international law governs the mutual relations of states with respect to their rights and duties, as in peace and war. Private international law, also styled "conflict of laws," has to do with human rights in general, and those private relations which states recognize to belong to persons not subject to their authority. Thus the effect of a contract of marriage made in a foreign country, or of a will, deed, and the like, are topics of private international law. Where the laws of different states or nations conflict in these matters it has been referred to under the appropriate subject in the various books of The Home Law School Series. We are now concerned solely with the subject of Public International Law.

Sec. 1964. INTERNATIONAL LAW DISTINGUISHED FROM THE MUNICIPAL LAW OF A STATE.—International law differs from municipal law in that it has no single executive charged with its administration, and that it is enforced by direct and positive pains and penalties. But many principles of international law are embodied in the municipal laws of the various nations. Thus, it is forbidden by statute

for persons to enlist in times of peace to fight against another country. The common law of England and the United States recognizes the international law, and the Constitution of the United States expressly provides that Congress shall have power to punish offences against the laws of nations. In 1818 Congress passed an act specifically forbidding the enlistment of our citizens to fight against nations with whom we were at peace. But regardless of statute, it is the duty of a nation to uphold the rules and regulations of international law, so that a nation's responsibility may be broader than is indicated by its statutes, as was the case with England in our civil war allowing vessels to be fitted out in her ports to prey upon our commerce.

Sec. 1965. THE CODE OF INTERNATIONAL LAW IS PROGRESSIVE AND IS CONSTANTLY INCREASING.—The code or body of international law is generated in the intercourse, friendly or hostile, between the various nations, and is constantly changing or being enlarged. It is said that every great war writes some new statute or rules on the book of international law. Thus prior to the Crimean war in 1854, privateering had been allowed, in the treaty of Paris, thirty-eight nations of the world agreed to abolish privateering in time of war. Since that time none of the contracting parties could lawfully allow privateering. So in times of peace as a result of investigation the rules of international law may be changed or added to. Thus when coal began to be used on

steam boats it was added to the list of contraband articles which could not be furnished by neutrals to the belligerent nations without risk of being seized as contraband. When two nations have agreed by arbitration or treaty to settle a question between them, they may submit the points so settled to the other nations for acceptance, and if accepted they then become a part of the code of international law.

Sec. 1966. WHAT IS ITERNATIONAL LAW, AND WHERE IS IT FOUND?—The rules of international law consist of, or are derived from the following sources:

1. Treaties or compacts between independent nations. But such a treaty between two nations does not affect other nations unless they choose to come in and assent to the terms of the treaty, or unless the signers of the treaty announce the general rule for themselves in relation to all other nations. The treaty is in effect a contract between the nations which are parties to it. And like a contract, a treaty which has been obtained under duress or contrary to all justice, may have no binding effect thereafter. Thus when Napoleon got possession of Ferdinand VII, of Spain, and made him renounce his right to the crown, it was subsequently held to be of no validity as being a species of highway robbery. But a treaty obtained fairly as the result of a war is valid.

The silence of a modern treaty concerning a doctrine previously acquiesced in, may indicate, not that

the doctrine is abandoned, but that it is so generally recognized that a re-statement of it is no longer necessary. Thus it would be utterly unnecessary to re-state in a treaty that captives in war should not be treated as slaves.

The chief treaties of importance are those since the treaty of Westphalia in 1648, and are about thirty in number. These are considered as the great epoch or milestone treaties in international law.*

The treaty of Westphalia is, by common consent, the origin of the modern relations of the European states. It was the beginning of a group of treaties to sum up the end of the thirty years war, and has settled the disputes of a number of states to the present day, especially as to religious matters. These treaties were agreed to by all the leading powers of Europe, and settled the vexed questions of religion and territorial boundaries. For precedents in international law we seldom go back of the treaty of Westphalia.

Sec. 1967. SAME SUBJECT—2. MANIFESTOES AT OUTBREAK OF WAR.—Another source of international law is the manifestoes issued by nations at the outbreak of war, and the dispatches of secretaries of war, and the like. These manifestoes or proclamations are statements of their ideas and conclusions as to the principles of international law, and the rules governing them as to their conduct towards neutrals. Thus in the Civil war, when we declared a

*See Woolsey Int. Law. Appendix.

blockade, we issued a declaration as to blockades and the relations of neutral nations thereto.

Sec. 1968. SAME SUBJECT—3. DIPLOMATIC CORRESPONDENCE.—A third source of international law is the diplomatic correspondence published by the various governments. It is a common custom now for the principal governments to publish a volume of this correspondence each year. In England this publication is called the "blue book." In the United States, these volumes are bound in red and called the "red book." The German government's publication is called the "white book." These books of correspondence indicate the stand taken by the respective governments on questions of international law.

Sec. 1969. SAME SUBJECT—4. DECISIONS OF PRIZE COURTS AND INTERNATIONAL TRIBUNALS.—Another source of international law is the decisions of prize courts and international tribunals.

Prize courts are courts set up in time of war to pass on captures at sea. They are, like the admiralty courts, obliged to follow the international law on the subject.

International Tribunals are those which the various nations have agreed to have established for the decisions of matters of controversy. Thus such a tribunal was established to settle the Alabama affair; and the Behring Sea controversy. A permanent trib-

unal has long been talked of, and conferences to this end have been held. The Hague Arbitration Tribunal has passed on many important questions. The decisions of international tribunals are regarded as of the highest authority as likely to be free from prejudice.

Sec. 1970. SAME SUBJECT—5. AUTHORITATIVE WRITERS, MARINE CODES, ETC.—Other sources of international law, are the accepted authors who have written text-books on the subject, and those writers who have been appointed to give their opinions on disputed points for the guidance of a government. So the history of the various wars and the negotiations incident thereto, afford precedents indicating what the international law on various questions is. So the marine codes, and usages, and ordinances and instructions issued to prize courts indicate what is accepted as international law. The marine codes are of very ancient origin and have changed but slightly. Thus the law of Rhodes, or Rhodian Code, used by the Romans, is very similar to modern codes. Among the Mediterranean provinces a number of marine codes sprang up, and were recognized as binding. One of these early codes was known as the law of Oleron; another the code of Wisby, another the "consulatus del mare." From all of these codes was drawn up the Ordinance of Louis XIV, of France, in 1641, which is the foundation of

all modern codes. These Marine Codes contained provisions for the protection of sailors, passengers, regulations of pilots, and the like, some of which are much similar to modern provisions.*

*Story's Miscellaneous Writings, Page 102; Pardessus History of Commerce, Vol. 1.

## CHAPTER III.

### STATES AND THEIR RELATIONS IN TIMES OF PEACE.

Sec. 1971. MEANING OF A STATE.—A state is explained to be a society of men seeking political ends, professedly by means which are in accordance with justice, having a stable and responsible organization and occupying fixed territory.

A society of men for religious purposes is not a state, it must be for political purposes. And associations aiming to accomplish their ends by immoral or unjust means are not states, however complete their organization. Thus pirates banded together, with government, and rulers, are nevertheless not to be regarded as a state.

So a corporation, which may perform some of the functions of a state is not to be considered a state. Thus the East India Company, which had a wide range of powers, was not a state. They do not control matters of state, and are not independent in the sense of a nation. So nomadic or wandering tribes with no fixed and prescribed territory are not regarded as forming a state. This is the modern doctrine, but perhaps was not true in the middle ages, when tribes wandered from place to place, but were still regarded as a nation. The present idea of fixed territory being

necessary to the existence of a state is a development from feudalism, when everything depended on the possession of land.

No particular number of persons are necessary to constitute a state. It is sufficient if it meets the responsibilities of a state, though its population is somewhat limited. Thus Texas was a separate state at one time; and the Hawaians constituted a state though of a very limited population. Montenegro, with an army of eighty men, was nevertheless regarded as an independent state.

The distinction usually made between a state and nation is this: A nation is a family or race having a common origin, common customs, and generally, a common language, and may be scattered through several states. Thus the German nation, the Hebrews, and the like.

A state may be made up like Austria, of a number of distinct peoples. It is the organized political society, or entity, which is the state, or artificial person recognized in international law. But a nation or common race may get together and form a single state. The words are sometimes used as synonymous.

The word state has a limited sense in our federal Union, as one of the component parts of the United States.

Sec. 1972. INTERNATIONAL LAW RECOGNIZES THE INDEPENDENCE AND EQUALITY OF STATES.—International law, at the out-

set, recognizes: First, the independence; and second, the equality of states.*

Sec. 1973. WHAT THE INDEPENDENCE OF A STATE IMPLIES.—The Independence of a state implies the following things: 1. The right of territorial inviolability. 2. The right of choosing its own government. 3. The right of self-protection. 4. The right of acquiring territory. 5. The right of administering its domestic affairs. 6. The right of commercial development. These will now be considered briefly.

Sec. 1974. SAME SUBJECT—TERRITORIAL INVIOLABILITY.—The right of territorial inviolability implies the right of jurisdiction over the water and land within its boundaries, and for certain purposes, over the sea to the distance of a league from shore, and over ships on the sea.

The Marine Belt. The distance of a league from shore over which a state has jurisdiction for certain purposes is known as the marine belt. This is a survival of a right to the sea which anciently prevailed and which was of much larger extent. The principle on which it rests is that this belt is necessary for the protection of the coast, the property and lives on shore, and the collection of customs.

Two questions arose in determining the marine belt: 1. What is to be regarded as the coast line from which to measure the marine belt. 2. What shall be

*Kent's Com. Vol. i, 165; Phillimore Int. Law, 162.

the width of the marine belt? For the coast line the Romans took the extreme high water mark. Some modern writers maintain that the land extends to where the water is navigable; others suggested a movable line changing with the tide. In modern fisheries treaties the low water mark is usually taken as the coast line. German authorities contend that the shore line should extend only as far as batteries can be erected to defend the coast. As regards the width of the marine belt, in the middle ages the ideas as to this strip were varied. By some it was as far as a hammer could be thrown, or an arrow shot; again, it was as far as the human voice would carry; as far as the horizon could be seen; then it was sixty miles, or a day's sail of a galley. This latter distance came to be observed and was later extended to a distance of one hundred miles, and was asserted by Russia in 1821 in regard to Alaska.

Vattel claimed that so much of the sea as was necessary for the safety of the shore might be owned by the state.

The doctrine accepted in modern times was first suggested by Bynkershoek, this was a marine league, or as far as a cannon ball could be fired. Modern cannon will carry many times three miles but the distance has not been correspondingly increased. Chancellor Kent made the claim that the United States could control the sea inside of a line drawn from promontory to promontory, as from Key West to

the Mississippi, but this has been abandoned, and the three mile limit is generally accepted.

Inside of this marine belt a nation has the right to protect the collection of its revenues, and enforce pilot regulations. And by treaty with England we can overhaul vessels four miles from shore. It is a nation's right and duty to enforce the neutrality of its marine belt by preventing hostilities between foreign vessels therein. Within this belt the nation controlling the shore has the exclusive control of fisheries. Foreign ships have the right of innocent navigation within the marine belt, and it is an open question whether offences committed on board foreign ships passing through the marine belt are within the jurisdiction of the state controlling such waters.

High Seas. The high seas are not a part of the territory of any state, but are regarded as open and free to all nations. The reasons given are on account of the vast expanse of the sea; on account of its fluidity; and on account of the inability of any one nation to reduce the whole of it to possession and control.

It was not always admitted that the high seas were open and free to all. From the thirteenth to the eighteenth centuries many claims to the control of parts of the ocean were asserted, some of these were based on the authority of a grant by the Pope to certain favored nations. Thus Pope Alexander VI, divided the entire sea between Spain and Portugal by a special decree to that effect. Other nations paid

no attention to these preposterous claims. In some cases the claim to the control of the sea was based on the right of discovery. In others on account of owning the adjoining coast, and protecting the waters from pirates. Thus Portugal claimed a path to India by right of discovery; Spain claimed the Pacific Ocean by right of Balboa's discovery; Russia claimed the North Pacific Ocean on the ground of contiguity; Denmark claimed the North Sea, and England claimed all the seas around her shores. Venice claimed the Adriatic on the ground of protecting it from pirates. These ancient claims were all abandoned long ago, and the high seas are indisputably open to all nations. But no nation has a right to do wanton mischief on the high seas, as to put wrecks in the path of vessels, or kill great numbers of fish by unusual means.

Gulfs and bays of the larger sort like the Gulf of Mexico, and the Bay of Biscay, are treated as part of the high seas and open to all nations. Small bays and road-steads are territorial. The tendency is to consider bays of less than ten miles in width territorial, and wider ones as part of the high seas. So where a larger bay runs far inland like Delaware and Chesapeake Bays they are considered as being territorial. There is no absolute rule to this effect but this is the tendency.

So straits more than six miles wide, or of less width where they connect navigable waters or seas are open to all nations. The riparian nation or na-

tions may protect the shores, but not so as to interrupt navigation. Thus Gibralter could not be closed if less than six miles; and many other straights and channels are open to all though much less than six miles in width. England has had to give up control over waters around the British Isles, and foreign vessels no longer need to dip their colors in the English Channel.

Denmark from an early date levied sound dues on vessels passing through the straight between Denmark and Sweden. This was challenged by the United States in 1853; in 1857 the European states bought off the claim of Denmark for a cash sum, but the United States did not join in the treaty, and later made a special treaty with Denmark, paying $393,000 for the right of free navigation of the sound. In the treaty the United States did not recognize the right of the claim, but paid the money rather to assist the King of Denmark to keep up light houses and buoys.

So the Dardanelles and Bosphorus have long been a matter of international controversy. The channel is narrow and Turkey controls both shores, and claimed the right to control the waters. But within the straits is the Black Sea, a large navigable body of water which would be closed to Russia if it could not use the straits. It is now settled that these straits are to be open to merchant vessels at all times, and to war vessels in times of peace with the consent of Turkey. This stipulation was somewhat stretched by Russia in her late war with Japan.

Sec. 1975. SAME SUBJECT—THE RIGHT OF A STATE TO CONTROL RIVERS.—Rivers that are wholly within a state are lawfully under its control, but are generally open to commerce as a matter of fact. This rule originated with the Romans, whose rivers were open to all nations. In the middle ages the rivers were closed to commerce. Thus on the Rhine many castles were built for the purpose of levying tolls and plundering the people using that water course. Grotius, who was imbued with the principles of the Roman law, in 1625 advocated the innocent use of rivers, maintaining that so long as no damage was done to the riparian owners the other nations had a right to navigate rivers. Vattel followed the same line of reasoning and the doctrine came to prevail as the feudal system fell into decay and the robber barons were destroyed. This innocent navigation was subject to some restrictions imposed by the riparians, and reasonable tolls were collected down to the Napoleonic era. But quite generally now the great rivers of the world, as the Amazon, Po, Congo, and the like are open to the free navigation of the various powers, by proclamations and treaties. The state through whose country the river flows retains the right to close the river at any time, and may do so since it controls both banks and the river is within its territory, and only opened to free commerce by comity.

Where the river flows through two or more states, two questions arise: 1. May each riparian state exclude other riparians? 2. May each exclude the world from

the navigation of such river? Thus the Danube, the Rhine, the St. Lawrence and other rivers flowing through two or more states, might be rendered useless if one of the riparians had the right to close it to the others or to the world. Hence, there is a strong tendency to answer both questions in the negative, though there is hardly a full and complete recognition of the principle. The difficulty arises in deciding the matter that the compulsory free navigation of such rivers interferes with the right of a state to control its internal affairs and regulate its territory, and if such rivers may be closed it interferes with the rights of commerce. The liberal view as to such rivers being kept open is gaining ground.

At the downfall of Napoleon the great nations who were combined against him decided in the Congresses of Paris and Vienna, in 1814 and 1815, while remodeling the relations existing between them, that many of the smaller rivers, as the Elbe, Rhine and the like, should be open to general commerce. But many restrictions have been placed on such open navigation by the riparians, which practically exclude foreign nations. Thus in the navigation of the Rhine, the Captain must be a German, the boat must be made in a certain manner, and the like. The Danube, while practically open in its lower part, is subject to control of riparians in its upper part.

The United States had some dispute with Spain as to the navigation of the Mississippi and with England as to the St. Lawrence. Louisiana belonged to Spain

from 1762 to 1800, and to France from 1800 to 1803, when the United States purchased it from Napoleon. In 1763 by treaty Spain gave Great Britain the right to navigate the Mississippi. By the treaty recognizing the Independence of the United States in 1783, Great Britain granted to us and kept for herself this right. In 1784 Spain protested against our use of the Mississippi, on the ground that Great Britain had no power to transfer what had been granted to her. The Confederation Congress, led by John Jay, decided to make a treaty with Spain, by which we would secure trade relations on the Mediterranean and waive our claim to navigate the Mississippi for a period of twenty-five years. The west was unsettled and of little importance, and it was feared that our country might become too diversified by opening up the Mississippi. So we were unprepared for a war with Spain. This treaty was only ratified by seven of the states, and nine were required under the articles of confederation. The whole matter was settled by our purchase of Louisiana.*

In the treaty of Ghent made at the close of the war of 1812, the right of Great Britain to navigate the Mississippi was not mentioned, and it was contended that she no longer had the right. But this contention has been abandoned and Great Britain has the right to use the Mississippi.

Before the era of railroad construction the St. Lawrence river was considered of great importance and

*Curtis' Hist. of Constitution, Vol. 1, 312; McMaster's Hist. U. S. Vol. 1, Ch. 4.

the same questions were involved as in the case of the Mississippi. The United States repeated the argument to Great Britain, which the latter had made to Spain during the Mississippi controversy, and further claimed that the St. Lawrence was in the nature of a straight connecting the ocean and the great lakes, or two large bodies of navigable water, and that it was in accordance with the trend of the times to recognize the right of other nations to use similarly situated rivers, as was the case in Europe by the treaties of 1814 and 1815. Great Britain replied that the European rivers were opened on the ground of general convenience, which did not apply with the like effect to the St. Lawrence. The controversy was finally settled by the treaty of Washington in 1871-1872, which concluded the arbitration of the Alabama claims, in favor of the United States, which obtained the free use of the St. Lawrence forever. At the same time the United States agreed that Lake Michigan, which is wholly within our territory, should be open to Great Britain, but might be closed on giving two years' notice. These treaties or agreements were special as between the contracting parties and do not affect the general question of the freedom of rivers. Great Britain also obtained the right to navigate three rivers in Alaska.

The principle of open navigation of rivers has not been fully acknowledged for the reasons that it may be necessary for a state to close such rivers in order to fulfill its destiny; and the riparians claim a community of property in the river. But it is generally agreed

that the same control may be exercised over a river running through two states as a single state exercises over a river wholly within its territory. Although this principle has not reached the stage of being international law.

A river which forms the frontier between the two countries, as the Rio Grande is open to equal navigation by the countries whose boundaries it forms, and unless otherwise defined, the boundary line is the middle line of the main channel. If islands are formed on either side of the channel, or accretions added to the banks of the river, they belong to the state on whose side they appear. Where the main channel of the river gradually changes, the boundary changes with it; but this is not the case where a great flood causes a phenomenal and extraordinary change.*

Sec. 1976. SAME SUBJECT—RIGHTS OF STATE OVER ITS CANALS.—Canals are subject to the control of the state in whose territory they lie. And this is true of inter-oceanic canals. But by comity such canals are, and probably will be open to commerce and to war vessels in time of peace. This does not mean open to free use, and tolls are charged to pay for the construction and maintenance of such canals.

The Suez Canal is owned largely by Great Britain and its use is a matter of international agreement. This agreement of the European powers, made in 1888, opened the canal in war and in peace to all vessels. But

*Woolsey's Int. Law, Sec. 62.

no nation can have more than two war vessels in the canal at once. The use of the word "neutralized" was avoided in this agreement, as its use would prohibit war vessels from using it.

By treaty with England in 1850, called the Clayton-Bulwer treaty, the United States and Great Britain agreed to guard the neutrality and peace and security of any canal that might be built across the isthmus of Darien, and each nation was to keep from the exclusive control of such a canal. This stipulation was contrary to our general policy, which aims to keep exclusive control of matters in this hemisphere, and the United States has been trying ever since to get around it.

Sec. 1977. SAME SUBJECT—RIGHTS OF A STATE OVER SHIPS ON THE HIGH SEAS.—It is often stated that ships are territory of the country to which they belong. The rule being, that every vessel, public or private, while on the high seas, is subject to the exclusive jurisdiction of the nation to which it belongs.* A state may enforce its municipal laws against the officers, crew and passengers on ships on the sea the same as on land; and the sovereignty of a nation is as much violated by interfering with its ships on the high seas as by attacking its territory, since the ship represents the territory of the state to which it belongs.

In foreign ports private ships are subject to the lo-

*Dana's Wheaton's Int. Law, Sec. 106; 1 Kent Com. 26; 150 U. S. 249.

cal jurisdiction, and this is perhaps true while they are in the marine belt. But there is a tendency to follow the French custom and make a distinction between offences committed against members of the crew, and those committed against the laws and order of the harbor, leaving it to the nation represented by the ship to punish the former.**

Public vessels, including not only war vessels, but troop ships, mail packets and the like, are exempt from the jurisdiction of the foreign state within whose waters they may be, though they are under the obligation to respect the laws and regulations of such foreign country. The remedy for a violation of such laws is by a complaint to the state to which such vessels belong. Perhaps neither civil nor criminal process can be served upon a person on board a foreign ship of war in a United States port.* A war vessel carries the jurisdiction of its country everywhere.

Much indulgence is granted to American vessels in Spanish American waters and ports in the case of political refugees from such countries. When our ships have these refugees aboard and touch at a port of the country to which the refugees belong, our government has insisted that the refugees cannot be taken from the vessel, but this applies only to political refugees and not to persons guilty of private crimes.

Acts of piracy may be punished by any nation which may capture the offender, irrespective of the nationality

**92 U. S. 520; 7 Cranch, 144; 120 U. S. 1.
*7 Op. Atty.-Gen. 122.

of the vessel on which the offence is committed, or on which the pirates are found.

Sec. 1978. SAME SUBJECT—2.—RIGHT OF A STATE TO CHOOSE ITS OWN GOVERNMENT.—Every state has a right to choose its own government. But this does not exempt it from fulfilling the obligations already assumed under some other form of government, and this is so though the state comes to an end by absorption into some other state, as was the case when Texas came into the Union. All the debts contracted by Texas, an independent state, had to be paid by the United States. And France, through all of her changes of government, has had to pay former obligations. The life of a state is a continuous one, and it cannot by a change in the form of government shake off its obligations.

So the right of a state to choose its own government has not prevented certain states being interfered with on grounds of humanity, where the government has become so oppressive as to be unendurable. Cromwell interfered in the case of the Savoy government; and in 1837 Greece was rescued by England and France from Turkey. But this plea of interference on the ground of humanity is sometimes made the excuse for an illegal and arbitrary interference.

Perhaps the integrity of a state could be interfered with in Europe under the "balance of power" theory, by which if one nation in Europe becomes so powerful as to threaten or menace the others, they may all unite to put a check on the domineering nation. The coali-

tion of the powers against Napoleon was of this nature, as were the wars of the French Revolutionary period. Many of the rumors of wars in Europe are grounded on this balance of power theory.

The state's right to choose its government does not prevent its being interfered with to suppress dangerous revolutions, though this doctrine is sometimes antagonized by England and the United States. Russia once invaded Hungary to stop a revolution, fearing that the democratic movement there would be a menace to her own autocratic government. It is needless to say that Russia will likely have her hands full in the future with her own revolutionists, and not be inclined to meddle with other nations.

While the interference of other states in behalf of insurgents has not been generally sanctioned by international law, on a few occasions, sympathy, if not active aid, has been tendered insurgents battling in a just cause against an oppressive government, as was the case of Garibaldi in Italy.

In 1861 Spain made a proposition to France and the United States to enter Mexico and make reprisals for the payment of debts due these nations. This is a common form of collecting debts against a weaker nation, and is practiced quite frequently on the South American Republics, and is sanctioned by international law. The United States refused to take part in the matter, and France and Spain went forward themselves. Spain and England later feared that France had formed a design to found a great Latin nation in

America, and wanted to get a foothold in Mexico. By the influence of France a monarchical government of the old style was set up in Mexico with Maximilian, of Austria, as the reigning monarch. There was no one to oppose Napoleon III, in making this unjustifiable attack on the government of Mexico, as the United States was in the throes of the civil war. Later the Mexicans arose and overthrew the government of Maximilian, and he was shot, putting an end to Napoleon's scheme.

Sec. 1979. SAME SUBJECT—3. THE RIGHT OF SELF-PRESERVATION, OR SELF-PROTECTECTION.—The right of self-protection extends to entitle a state to invade another's territory if an attack is threatened, and such an invasion for the purpose of meeting or quelling a threatened attack is not making war on the nation invaded. This is a well-settled principle. Thus in 1837 there was a disturbance in Canada approaching to a rebellion, and the government of Canada feared help would be sent in from the United States. Near Niagara Falls the insurgents did get some help from the American side, and were using a small steamboat named the "Cadillac"; the Canadian government organized an expedition, and coming on American territory attacked the boat and after killing a man, let the boat loose and it went over the Falls. The matter was taken up by our government, but on investigation it was decided by Webster, who was Secretary of State, that the seizure of the

boat was justifiable and that under the rules of international law we could not complain.

Sec. 1980. SAME SUBJECT—4. THE RIGHT OF ACQUIRING TERRITORY.—Territory may be acquired by a state by occupation of land previously unoccupied by any civilized state; and it is now generally agreed that discovery of new territory must be followed by occupation to give title to the discovered territory, and such occupation must be continuous.

Territory may be acquired through cession by one state to another. The cession may be the result of amicable negotiation and agreement, or be the result of a war and the conditions of making peace by the victor against the vanquished. Thus the United States secured the Philippine Islands from Spain; and Japan certain concessions from Russia as a result of war. Territory may also be acquired by prescription and accretion.*

Sec. 1981. SAME SUBJECT—5. RIGHT OF ADMINISTERING DOMESTIC AFFAIRS. — Within its territorial boundaries a state has absolute and exclusive jurisdiction over persons and things, and of controlling its domestic affairs, and is not to be interfered with so long as it answers its duties and obligations imposed by international law.

Sec. 1982. SAME SUBJECT—6. THE RIGHT OF COMMERCIAL DEVELOPMENT.—Interna-

*Hall on Int. Law (4th ed.), Sec. 36; Phillimore on Int. Law, Secs. 238-240; Bluntschli Int. Law, 295-299.

tional law recognizes the right of a state to commercial development. And under modern international law there is a tendency to allow civilized nations to form protectorates over semi-civilized people without making the territory occupied by such people an integral part of the protecting state.* So the civilized nations by agreement, in cases, between two or more of them, recognize certain territory as being within the "sphere of influence" of a certain nation, who thereby secures the privilege, so far as the agreeing nations are concerned, to extend its commercial or political power within the sphere so designated.**

Sec. 1983. OF THE EQUALITY OF STATES. —The equality of a state implies the same rights as other states have of making treaties and compacts; of obtaining justice and recognition from other states of its subjects and rights, and equal recognition as others of its general government. While all states are equal, the equality is a legal one and not an equal political equality in the sense that they would have the same weight in international matters. In Europe, for instance, while the smaller states are recognized as being equal in a legal sense, their affairs are to a considerable extent controlled by the large powers, who determine largely their boundaries, and general relations. The equality of a state in a legal sense, is also governed and qualified by the conditions already stated as to its

*Hall on Int. Law, Sec. 38.
**Lawrence on Int. Law, Sec. 103.

inability to throw off obligations already assumed, and the possibility of its being interfered with by other nations for a failure to meet its manifest duties and obligations.

Sec. 1984. OF DEPENDENT AND PROTECTED STATES.—There are certain states that are not recognized as having full legal equality with the others. These dependent or protected states are said to retain only a portion of their sovereignty; their international relations are governed by the states having supervision over them, and in some cases even their domestic affairs are managed by the superior state. Thus Turkey has suzerainty over a number of small states, which enjoy some sort of independence in internal affairs; England has a protectorate over the states in Borneo, which are governed by native rulers under the control of England; Germany has a protectorate over a number of African states, and France over Madagascar. China also had control formerly over a number of states, as Corea, Anam, Siam and Burmah, which paid tribute to the Emperor of China, but she has lost control over many of her tributaries. These partially independent states are within the purview of international law.

Sec. 1985. OF THE RECOGNITION AND ACKNOWLEDGEMENT OF A NEW STATE OR GOVERNMENT.—New states generally come into existence by breaking away from an existing state; and the question arises as to when they should be recog-

nized and acknowledged as independent by the parent country and by other states. A third power is not justified in giving such recognition until independence is actually established, or while a substantial struggle to subdue the new state is being made by the parent country, but recognition is proper when the efforts to recover authority are so inadequate as to offer no reasonable ground for supposing that success may ultimately be obtained. Premature recognition may be regarded as intervention and as grounds for war by the parent country against the recognizing state. The recognition may be by an express declaration addressed to the new state, by negotiating a treaty with it, or by the reception and recognition of its diplomatic agents. Recognition is not equivalent to acknowledging the independence of such a state by the parent country. Thus Portugal having revolted from Spain, was recognized by England in 1641, but not acknowledged by Spain until 1688. So the independence of the Netherlands was not acknowledged by Spain until seven years after they had gained their independence and all nations but Austria had recognized them. And the United States recognized the independence of the South American States in 1822, though Spain did not acknowledge them until much later.

International law recognizes the *de facto* government of a state, that is, the one actually in power, and the one that is able to and does redress wrongs and fulfill the obligations of the state. A new government to justify recognition must be acknowledged by its

subjects and have a reasonable prospect of meeting international responsibilities. France recognized the independence of the American Colonies in 1777, though England was pushing the war for their subjugation vigorously, and England immediately declared war on France.*

Sec. 1986. THE RECOGNITION OF THE BELLIGERENT RIGHTS OF INSURGENTS DOES NOT AMOUNT TO A RECOGNITION OF THEIR INDEPENDENCE.—A state may recognize the belligerent rights of insurgents or revolutionists without thereby recognizing their independence. Independence results when the war has successfully terminated, but the mere recognition of insurgents or revolutionists by the parent state as belligerents, by exchanging prisoners, or the like, would not justify other nations in recognizing their independence. The parent state is responsible for all the damage caused neutral nations by revolutionists prior to their recognition.

Sec. 1987. OF THE ORIGIN AND EFFECT OF THE MONROE DOCTRINE.—The so-called "Monroe Doctrine" as a proposition declaring the attitude of the United States towards other nations in regard to the American continent originated from two passages in President Monroe's message to Congress

*Hall on Int. Law, Sec. 26; Wharton's Dig. Int. Law, Sec. 70; Dana's Wheaton's Int. Law, note 16. The courts cannot treat a revolutionary party as a state until recognized by the executive. 3 Wheat. 610; 13 Pet. 415.

in 1823. At that time Russia claimed the territory to the fifty-first degree north latitude; and it was the reported purpose of Europe to interfere in the conflict between the Spanish-American republics and Spain for the purpose of stamping out the growth of the republican governments, and compelling their obedience to their monarchical parent.

As to the first of these claims, Monroe said that the whole continent was now occupied by civilized nations, and that henceforth the American continent was not to be considered as a subject for colonization by any European power.

As to the possibility of the allied powers of Europe interfering with the South American Republics as they had crushed the popular uprisings in Piedmont, President Monroe said: "With the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States."

This statement was but an expression of the American view of things from Jefferson's time. We maintained that we would not and did not interfere with the politics of Europe, and that they, on their part, should not attempt to apply old world systems to the conditions existing in the new.

The doctrine in its enunciation is simple enough but in its application has been made to cover a wide range of subjects, and is likely, at some time, to involve the United States in difficulty with some or all of the European powers.

In 1825 it was proposed in Congress to apply the Monroe Doctrine by having the United States agree to take up arms in behalf of the South American States, but it was decided not to carry the proposition to the extent of declaring in advance what should be done.

In 1845, during the presidency of James K. Polk, the doctrine was asserted in regard to Texas, by stating that the United States would not tolerate any European nation intermeddling with the affairs of that republic. During the same administration in 1848, it was proposed to annex Yucatan to protect it from the encroachments of European powers. Considerable discussion followed, and Calhoun, who was a member of Monroe's cabinet, contended that the Monroe Doctrine did not mean that the United States should interfere in every case, but that each case should be decided as it arose and stand on its own merits. Cass, of Michigan, claimed that the doctrine aimed to oppose all acquisition of territory by foreign powers, whether by settlement or colonization, or otherwise.*

The exact meaning and application of the Monroe Doctrine is still an open subject. Congress has never undertaken to define, limit, or explain it, and it stands

*Calhoun's Works, Vol. 4, page 454.

as a principle or doctrine and not an act. It can be applied to any particular case when the United States deems it for the best interests of this country to oppose the aggrandizing plans of European powers. We are not bound to recognize only republican forms of government in America, and in the past we have recognized several empires on this continent.

The Monroe Doctrine may be said to be a principle or tradition in harmony with our national system of government and our historical development—that we look with displeasure upon any interference of European powers with American governments, and that we would doubtless go to arms to prevent such interference if it was likely to result in the possession of American territory by a European power.*

In 1865, the United States objected to the continuation of the French troops in Mexico, under the Monroe Doctrine, and as a result the government set up under Maximillian came to an end. So the United States was inclined to protest against the French government's possession of the Panama Canal. But as we have now purchased all of their rights, and assumed

*Woolsey's Int. Law, Sec. 247; Wheaton's Int. Law, 97. It is perhaps true, that no European nation has ever indicated an acceptance or acquiescence in the Monroe Doctrine, and whatever force or effect it has is due to the wholesome regard which European nations have for the ability of the United States to enforce its ideas. So far we have been moderate in our demands, and we have never been compelled to go beyond a mild protest to the power that we judged was about to infringe on the Monroe Doctrine.

the government in the canal zone, there can be no further difficulty in the matter. So quite frequently the doctrine has to be invoked to protect the South American Republics from encroachments and unjust demands of the European powers. And it is quite likely but for the Monroe Doctrine, and the strength of the United States back of it, that the South and Central American Republics would long ago have been carved up as the African states among various European powers.

Our purpose in asserting the Monroe Doctrine includes the protection of our commercial interests, and political peace and safety in keeping European powers from becoming entangled in American affairs. If France had been allowed to remain in Mexico, we would likely have become involved in numerous disputes with her.

As a result of the Monroe Doctrine, we have assumed a definite attitude towards Cuba, and while recognizing its independence we retain the right to protect it from the encroachments of all other powers. It is likely that we would assume the same attitude towards any other American country if it was about to surrender itself to any foreign nation.

Sec. 1988. OF THE ESTABLISHMENT OF EMBASSIES AND CONSULATES.—Since the congress of Vienna in 1815, and Aix la Chapelle in 1818, the diplomatic representatives of a state in a foreign country have been classified. Such representatives had been sent since 1648 but their order and rank was not

regulated until the congress of the allied powers in 1815. As regulated by the powers in 1815, there are four orders of ministers. These are:

1. Ambassadors, and, in Catholic countries, papal legates and nuncios. The legates were always cardinals, and were sent on the spiritual business of the pope; the nuncios were the pope's temporal ambassadors, and in Catholic countries had considerable power, and took precedence of all foreign ambassadors.

2. Envoys and Ministers Plenipotentiary. The double term is used in practice. Thus the United States uses both titles. Formerly there were ministers "ordinary" and "extraordinary"; the one being the usual representative, and the other applying to a minister sent upon some special mission.

3. Ministers Resident. These represent the affairs of the sovereign, if not the sovereign himself.

These three orders bear commissions signed by the sovereign or chief executive officer of the country, and are regarded as the personal representative of the sovereign.

4. Charge d' affaires. These are accredited by the ministers or secretaries of foreign affairs to the minister or secretary of the foreign state, and not by the sovereign or president.

The distinction between the first three as to powers is largely in name. Until 1893 the United States did not send ambassadors, and its ministers were limited to the other classes. We have followed the practice of sending the same order of minister to a country as they

sent to us. By the Constitution the government may send ambassadors, and the United States is now sending ambassadors to the principal foreign nations. These take precedence in rank on state occasions over ministers plenipotentiary, and perhaps are entitled to be received first by the foreign officials.

Nations are not obliged to send ministers or receive them as a matter of law, the doing so is a matter of comity and is universally followed. So that when nations are on good terms, a suspension of diplomatic relations is deemed an unfriendly act, though not sufficient to justify the declaration of war.

Foreign ministers to this country cannot directly address the president, but must communicate with him through the secretary of state. They are not allowed to meddle with the internal or domestic affairs of the country to which they are accredited. Their purpose is to represent the interests of their own country and people at the foreign capitol, but may, when solicited, look after the interests of another nation whose minister has been withdrawn.

When an embassy is received, a particular person may be refused. Thus if the person sent as minister is personally disagreeable to the executive or people to whom he is sent he may be refused. So that it is a general rule that the minister sent must be a "persona grata" to the country to whom he is sent. The first French ministers to the United States by their activity against the neutrality assumed by Washington in the conflict between France and England became distaste-

ful to our government and they were recalled by request. And on numerous occasions we have had reason for requesting the recall of foreign diplomats on account of some line of conduct distasteful to us. And a number of our ministers to foreign courts have been recalled because of becoming in disfavor at such courts.

So a minister may be refused by a foreign state if he is a subject of the sovereign to whom he is sent, and especially where such minister is an exile from the country to which he is sent. In such a case the allegiance of the minister would be divided between the two sovereigns. But until recently the doctrine of expatriation has been recognized, by which one may renounce his citizenship to one country and become the subject of another. The United States has refused to receive an American as minister from Honduras; but another time did receive a Mr. Burlingame, who had been our minister to China, and later was sent to us to represent China.

A minister may be refused also where his instructions conflict with the rights or laws of the government to which he is accredited. But this sort of a case has not arisen since the temporal power of the pope has been destroyed.

Some authorities hold that a minister could not be refused on the ground of sex or rank, and perhaps not on account of his nationality or race. There have been many instances in history of women acting as ambassadors, but not since the time of Charles II.

Sec. 1989. SAME SUBJECT—THE PRIVILEGES OF MINISTERS.—The minister of a foreign country, including his household and suite are inviolable; that is, he is exempt from civil and criminal process; from customs duties on his effects; from taxes on his personalty; and from any interference on account of his religious worship at his hotel or residence quarters.*

It was formerly contended that the diplomatic representative of a nation while in a foreign country dwelt on his own soil, under the theory of extra-territoriality; but the better opinion now is that these immunities are extended to a minister as necessary to the discharge of his duties and the securing of his independence.

In cases of crimes committed by a foreign minister, if dangerous or violent, he can be restrained, and escorted to the frontier. The general policy is to ask his country to recall him. They are usually dealt with very leniently on account of the representative capacity in which they act. If a minister was subject to arrest, it would interfere with the transaction of his official duties, and this is perhaps the reason of the rule.

The exemption of a minister from process in civil matters is well settled, and in England and the United States this exemption is secured by the municipal law, so that a minister could not be legally obliged to pay his creditors. The English statute upon the subject

*Hall on Int. Law, Sec. 50; Wharton's Dig. Int. Law, Secs. 92-96.

dates from the time of Queen Anne, when considerable agitation was caused by the arrest of the Russian minister for debt, and his sovereign, Peter the Great, demanded the head of the English sheriff who caused the arrest.

A minister may also refuse to testify in court, and his exemption is based upon the same ground of interference with his official duty, and the fact that in cross-examination he might be called upon for matters of diplomacy and state secrets. This exemption not to testify cannot be waived by a minister, as it is his duty to his government not to divulge secrets.

The property of a minister which is exempt from taxes and duties is his personal effects, and does not extend to property embarked in trade or business. And it being difficult to discriminate between the two classes of property it is not considered expedient for a minister to engage in business in the country to which he is delegated. And for the same reason ministers ought to be chary about giving their names and influence to stock companies in order to float the stock of the concern.

A minister's residence, which is also called his hotel, is sacred. But it must not be made a refuge for criminals; the minister may shelter persons in riotous times from mobs, and the like, but cannot give shelter to criminals who are amenable to legal process.

A foreign minister may conduct religious worship in his own house in accordance with his belief. This has become so well recognized as to be of little importance,

but in the past, when religious intolerance was uppermost, it was of considerable significance.

The dispatches and couriers are protected while on their way; this is necessary to secure a minister freedom of communication with his government, without which he would be unable to transact his official duties. This right is seldom interfered with now, but in the past it had to be guarded and was of the utmost importance. During a siege of a city the besieging army may refuse to allow dispatches to be sent out by ministers, as was the case in the siege of Paris by the Germans.

There is some dispute as to the right of a minister to cross a third state in going to the state to which he is accredited. According to Phillimore in times of peace the minister is not to be molested; while in time of war, to be secure he should have permission from the third state.

Sec. 1990. SAME SUBJECT—OF CONSULS.—The subject of consuls and consular offices is becoming more important each year, and their duties in furthering the commercial interest of the country they represent is receiving greater attention.

The consular office is a very old one, and a class quite similar to our consuls were employed by the Greeks to represent them at the various seaport towns. So in the fifth century such officers were employed by nearly all commercial nations where needed to look after the interest of their traders. The immediate practice of sending them to various places as at present was first

adopted during the crusades. The Genoese and Venetian trading concerns made settlements in the far East and needed judges to preside in these settlements and adjust controversies that arose from time to time. In the sixteenth century the right was claimed by the various states to make these appointments, and after the peace of Westphalia, in 1648, consuls were sent to all important ports, charged with the care of commercial interests. In some cases they retained their judicial character as late as 1842. But their original function of judges has been dropped now. The consular judges elected by the guilds of merchants in the past were the origin of commercial tribunals, and their usages and procedure were regarded as having some judicial authority. Some nations, as France, has established "tribunals of commerce" presided over by experts in commercial matters to decide disputes of a commercial nature. A similar purpose was answered by the early consular judges, when the municipal law did not extend to protect the various interests, as it does at present.

States are under no obligation to receive consuls, except as they have obligated themselves by treaty. When consuls are accepted, the foreign sovereign or executive recognizes or authorizes the exercise of authority by the accredited consuls by issuing an exequatur to each, which is a written authorization of his assuming his consular powers at the particular place. Sometimes when a minister is recalled these documents are withdrawn from the various consuls of that nation

The immunities of consuls are few in number. They may receive their personal effects duty free; have the national arms over their door; and in most countries, and especially if citizens of the country they represent, they are free from duty as jurors, from military service, and all duties inferior to their official work.

In the oriental countries consuls have been allowed to assume almost diplomatic immunities, since their duties cover a larger scope and their immunities must be correspondingly enlarged.

A consul holds intercourse only with the foreign local authorities. And can reach the foreign sovereign only through the local authorities or through the minister of his own government, from whom he gets his exequatur. The consular office is an inferior one to that of the regular diplomatic officers, and is more of a business office.

A government may send one of its own citizens to act as consul at a particular place, or it may commission its own citizen or a foreigner doing business in the foreign country to act as its consular representative. But the tendency is to do away with the practice of commissioning merchant consuls, and sending one direct instead.

Sec. 1991. SAME SUBJECT—DUTIES OF CONSULS.—The duties of consuls are many and various. Thus he acts as a notary in certifying invoices of traders and importers; consignments of goods are invoiced before being shipped, and the consul to whose

country the merchandise is sent makes three copies of the invoice which is sworn to by the importer, one of which is sent to the consul's home state to aid in the collection of the customs.

He acts in a judicial capacity in settling disputes between the officers and crews of ships from his country. These disputes are laid before him, and it is part of his duty to see to their being settled. He is also to protect and care for destitute seamen of his country. Our government has provided for sending destitute seamen to their homes. Another of the consul's duties is to gather information in regard to trade and commerce that will tend to assist in developing the commercial relations of the country he represents, and this information is communicated to his government in regular and systematic reports.

In Oriental lands, as China, Corea, Siam, and the like, the consuls have power to try civil cases, and issue orders of arrest to examine citizens of their own country, and either punish them or send them home for trial. The American consuls have considerable latitude in these countries over American subjects. The reason for this assumption of power is that our government will not allow our citizens in these countries to be tried under the system prevailing there, as we do not regard the oriental method of trying accused persons to be in consonance with our ideas of securing justice. We therefore provide a consular court for the trial and punishment of our citizens domiciled in these countries, and insist that they be recognized by

the local jurisdiction. The trials before the consul are not jury trials, but in the graver matters he calls other citizens to sit with him; these are called "assessors." In Egypt the various nations have been allowed to establish a mixed court consisting of judges from the various nations to try the citizens of those nations, and the local jurisdiction has no authority over the foreign residents.

Sec. 1992. SAME SUBJECT—CLASSES OF CONSULAR OFFICES.—The United States maintains an Agent and Consular General at Cairo, Egypt, with quasi-diplomatic functions. Then we have a number of Consuls General, one in each of the important countries, who have general supervision over the other consuls in that country, and all communications come through these Consuls General. Of the regular consuls there are two kinds: first, those who receive a salary of $1,000 and more, who are not allowed to engage in business for themselves; second, those who are allowed to engage in business, and perhaps get a small salary or certain fees for their services as consul. But there is a tendency to do away with this class of consuls. The United States also has a class of commercial representatives known as Commercial Agents, who have the regular powers of consuls, but sometimes are refused recognition by foreign countries. We also have Consular Agents or sub-consuls who represent the smaller places and are under the control of a regular consul in the vicinity.

Under President Cleveland, a part of the consular

service was put under civil service regulations, instead of being appointed by the political party in power. These include all those whose salaries are not more than $2,500 and not less than $1,000, and are to be appointed from the service or qualified by examination. Their fitness is determined by certain officers of the Department of State. Perhaps the United States has not given the same attention to its consular service as other commercial nations, and there is considerable agitation to provide a method of training young men for the service so that they may be more capable to fulfill the duties and requirements of the service.

## CHAPTER IV.

### RIGHTS AND DUTIES OF STATES IN TIMES OF WAR.

Sec. 1993. MEASURES OF CONSTRAINT SHORT OF WAR.—The regulations concerning the obligations and duties of nations and the rights of the respective belligerents and neutrals in times of war constitute the larger part of international law. There are certain measures to which a nation may resort to show its displeasure with another, which are short of war, and are regarded as a sort of intermediate measure between peace and war. These are: 1. Retorsion. 2. Reprisals. 3. Embargo and Non-Intercourse. 4. Pacific Blockade. 5. Retaliatory Acts. 6. Quasi or Limited War.

1. Retorsion. This is a term applied to the action of a state in treating the subjects of another state in substantially the same way in which the latter state has treated the subjects of the state using the retorsion. It is a sort of retaliation for lack of comity. Thus if one nation puts restrictions on travelers' passports, or levies a differential tariff, or makes other regulations to the prejudice of another nation, that nation may retaliate by adopting like measures against the other nation, and this is called "retorsion."

2. Reprisals. By a "reprisal" is meant a seizure of property of another state for the redress of an injury

either to the citizens or the state making the reprisal. It may also be used to compel another state to adopt or relinquish a certain course of conduct. To justify a reprisal justice must have been absolutely denied by the courts and the sovereign of the country against whom the reprisal is made. The injury must be an important one. It is usually the property of the offending nation or its citizens that is seized, and not persons, except in times of war. Reprisals are the common process of collecting an international debt when milder proceedings have failed. The reprisal should not be out of proportion to the injury to be redressed, and the state using the process should be able to show that it is just. It is a common proceeding for a strong nation to take against a weaker one, and in many cases leads to war.

3. Embargo and Non-Intercourse.—An embargo is a step nearer war than reprisals; it consists in the seizure of property, as vessels in ports, in view of hostilities, to be surrendered if the differences are settled without war following; if the dispute is not settled, the war dates from the seizure. In modern times such a practice is seldom resorted to, and foreign vessels are usually given a certain time in which to depart after the beginning of the war.* Another sort of embargo, practiced several times by the United States, is the preventing of its own vessels from going out of port in order to protect them from capture by other na-

*Lawrence on Int. Law, Sec. 158.

tions. This is a domestic affair and has no connection with the international embargo which marks the beginning of a war.

Non-Intercourse laws were passed by our country to forbid trade with England and France as a means of retaliating for their unjust treatment of our vessels.

4. Pacific Blockade. A blockade is a war measure, to be considered later, but of recent years it has sometimes been set up in times of peace as a measure of constraint. In such cases the tendency is to enforce the blockade only against the vessels of the nation whose ports are blockaded, leaving all other vessels free to pass. This sort of pacific blockade is admitted by publicists, but not when it is aimed to be enforced against all vessels.*

5. Retaliatory Acts. These are more serious than acts of retortion, as where the United States authorized the President to stop Canadian ships from entering our ports, and even to stop railroad traffic from Canada, as a method of retaliation for seizing our fishing vessels. This was during Cleveland's administration, and the power was not exercised by him.

6. Quasi or Limited War. Instances of this limited war are to be found in our own dealings with France in 1799. France had ravaged our commerce, seized our vessels and almost ruined our commercial trade, and our government authorized our ships to resist seizure, and to recapture ships that had been ca-

*Hall on Int. Law, Sec. 121.

tured. There was some fighting as a result, but war was not declared.

Sec. 1994. ARBITRATION AND AMICABLE SETTLEMENT OF DISPUTES.—Nations may also decide instead of going to war to arbitrate their differences by submitting the points in dispute to disinterested persons and agreeing to abide by their decisions. Many matters of late years, as to boundaries and the payment of claims are thus settled. The decisions of such boards of arbitration are binding, and the parties to the award are concluded, unless the decision is too broad, or there is evident fraud or denial of justice.*

It may become proper for a third state to offer its good offices for the settlement of disputes between other nations, before or after war has arisen, but the refusal of such an offer is no cause of offense. Such an offer may be made at the request of one or both of the disputants, or upon the general grounds of humanity and civilization. Several nations sometimes unite in making such an offer.

Sec. 1995. WAR DEFINED AND CLASSIFIED.—War is defined as a contest between nations or states, or between parties in the same state, carried on by force of arms. War is classified as "perfect," and "imperfect." A perfect war, meaning one in which an entire state or nation is at war with another state or nation, so that all members of the one

*Wharton's Dig. Int. Law, Sec. 316.

are authorized to commit hostilities against all members of the other. An imperfect war is one limited as to place, persons and things.*

Sec. 1996. THE COMMENCEMENT OF WAR. —While war is sometimes preceded by a declaration or notice to the enemy, and this was the practice previous to the last century, it is not regarded as essential and is frequently omitted. The war may be commenced by an ultimatum involving a demand, and the request for an answer within a limited time, coupled with the intimation that a failure to reply will be taken as a desire for war. A nation usually issues a manifesto at the outbreak of war, or a proclamation announcing the war and seeking to justify its position in the controversy, this may be addressed to its citizens or to other nations, but this is not considered as a notification to the enemy.

Sec. 1997. THE RECOGNITION OF BELLIGERENCY.—Where a civil conflict exists within a state, it becomes important to determine when other nations shall recognize a state of war as existing. Such a recognition of a state of war between a state and insurgents, simply indicates their right, or the fact that they are carrying on war, and has nothing to do with a recognition of their independence. A neutral nation decides this question with regard to its own interests and the facts. But there are certain important conditions which ought to appear as a pre-

*Dana's Wheaton's Int. Law, Sec. 296.

requisite. Thus, the insurgents should be strong and numerous enough to make a state in case they were successful; and they must be actually carrying on war. If the insurgents have ships of war on the sea, then their status is in more urgent need of determination, since if they commit hostilities and are not regarded as belligerents they are pirates, therefore whenever there is, or there is reasonable expectation of there being hostilities committed on the sea, recognition of their belligerency is justified. There should be some fair probability of success to justify the recognition of the belligerency of the insurgents. Contiguity of a nation to the seat of hostilities is an important factor in determining their justification in recognizing a state of war to exist, since it may become involved with the parties to the contest.

Sec. 1998. CONSEQUENCES OF RECOGNITION OF BELLIGERENCY.—The consequences of recognition are not always advantageous, as both the contestants then have the right to stop vessels and search them for contraband articles, which could not be done if they were not recognized as being at war. So the recognition releases the parent government from its responsibility for the damage and depredations of the insurgents to foreign nations. So where the recognition is premature, and the insurgents are quelled the parent country may take offense on account of such recognition of the insurgents. For these reasons, and on grounds of humanity, a parent state may itself recognize the belligerency of the insurgents, as was

the case in our Civil War. If they are recognized as belligerents they are to be treated as enemies and not as rebels.*

Sec. 1999. EFFECT OF WAR ON TREATIES.—The outbreak of war frequently has the effect of putting an end to treaty stipulations existing between the two countries. This is not necessarily the case, and stipulations in treaties which refer to and contemplate a future war, or which are evidently intended as a permanent condition regardless of future war, are not broken. So all provisions which refer to the method of carrying on war in case it should arise, are of full force and effect and are to be put into operation. So if the treaty is tripartite it is not generally suspended by war between two parties.

Sec. 2000. EFFECT OF WAR ON THE RELATIONS OF CITIZENS.—While a state of war exists, all subjects of one belligerent state are enemies of all the subjects of the other, and every kind of trading is absolutely prohibited between citizens or subjects of the contending countries, and all vessels or other property engaged in the forbidden trade are subject to condemnation when detected. The purpose of the provision is to prevent aid and assistance being given to the enemy.*

*Dana's Wheaton's Int. Law, note 15; Hall on Int. Law, Sec. 5; 97 U. S. 594.

*1 Wheat. 46; 8 Cranch, 155; 8 Wall. 195. Permission or license to engage in such trade may be given to individuals

Sec. 2001. WHAT PERSONS MAY ENGAGE IN THE WAR.—War can only be carried on by those who have an express or implied authority from a state which is one of the belligerents. The carrying on of war is an act of the state and not of individuals. So that "guerrillas" or "bushwhackers" are not recognized as belligerents, or lawfully carrying on war, and such method of warfare is forbidden by the rules of international law. Volunteer troops, however, may be enrolled and become regular soldiers for the nation they volunteer to assist. Some of the powers who maintain large standing armies have suggested that volunteer soldiers should not be recognized, as this would aid to some extent the nation with a large standing army, but the suggestion has never been acted upon and doubtless will not be.

Sec. 2002. CITIZENS OF ONE BELLIGERENT IN THE TERRITORY OF THE OTHER MAY BE ORDERED OUT ON THE OUTBREAK OF WAR.—The citizens of one state in the territory of another, are enemies of that state when war begins between the two countries. They sometimes are allowed to remain if they are quiet and orderly, but are frequently given notice to leave the country within a specified time. So the property of the enemy is in strict law confiscable, but in practice this is not generally done, except where the confiscation is necessary to reduce the supplies and munitions of the enemy. Under our rules the mere declaration of war does not

amount to a confiscation of the enemy's property within our territory; there must be an act of confiscation passed.*

Sec. 2003. OF THE CONFISCATION OF THE ENEMY'S PROPERTY.—Not only tangible property but debts due by citizens of the one belligerent to the other are confiscable. The debt is confiscated by having the citizen pay it to the state, and this is declared to be a bar to its collection again. The Confederate States practiced this method of confiscation, and the United States passed an act authorizing the confiscation of debts in 1862, but it was never put in practice. Public debts are not confiscable; thus during the Napoleonic wars the obligations between the belligerents were discharged; as was also the case during the Crimean war. This is a matter perhaps of comity, perhaps of necessity or expedience, since if they failed to pay once they could never borrow again.

Sec. 2004. EFFECT OF WAR ON COMMERCIAL RELATIONS.—Commercial intercourse between citizens of the respective belligerents at once ceases on the outbreak of war. And unless special licenses are issued by the government, which is sometimes done, no trade or intercourse can be legally carried on. All goods or property engaged in such trade are confiscated in prize courts; partnerships with the enemy are ended; policies of insurance and bills of credit issued to the enemy are void. So all contracts

*8 Cranch, 253.

made during the existence of the war are void. Contracts made before the outbreak of the war are not generally extinguished, but the remedies thereon are suspended until the close of the war, on account of the inability of the alien enemy to sue or be sued, but partnership contracts are extinguished, since they would involve commercial intercourse during the existence of the war.*

Sec. 2005. OF PRIVATEERS.—A privateer is a citizen who has obtained special authority from his nation to prey upon the commerce of an enemy with his privately owned vessels, and is allowed to retain a part of the captures made as a reward. The commission of such a person is called a letter of "marque and reprisal". Privateering was generally allowed and practised until 1856, when by the Declaration of Paris, at the end of the Crimean War, most of the leading nations in convention agreed not to use privateers in future wars; the United States was not a party to this convention and is not bound by it, but it is said to be unlikely that we would ever again employ privateers. The chief objections are that it is demoralizing, as it appeals to the base motive of plunder rather than to patriotism, and it is difficult to regulate such privateersmen.*

*Kent's Com. 66; Hall on Int. Law, Sec. 126; 93 U. S. 32; 5 Wall. 377; 49 N. Y. 12; 26 Gratt. (Va.) 145.

*Woolsey's Int. Law, Sec. 190; Hall on Int. Law, Sec. 180. The seven nations party to the Declaration of Paris, in the 4th Article adopted several sections, the first of which re-

Sec. 2006. WHAT MAY BE DONE IN WAR. —Under the rules of modern warface, force is to be used not to cause pain, but only such and so much as to accomplish the end sought in the speediest way. The advance of civilization and sentiments of humanity are tending to make war less cruel and barbarous, and as long as it has to be allowed to put as many restrictions as possible on the methods to be employed. It is unquestionably a relic of barbarism, and absolutely unnecessary under modern civilization, and it is only the criminal instincts of certain aggressive states in trying to get what is not theirs by force that stands in the way of doing away with war entirely. If a small per cent of the money and property used and destroyed in war could be used to create a peace fund to amicably settle international disputes, it would more than suffice to pay the most extravagant demands of bellicose nations.

The use of hot shot and chain-shot in war are some-

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ferred to privateering, which was declared to be and remain abolished; the 2d provided that a neutral flag covers the cargo of the enemy except contraband of war; the 3d, that neutral goods, except contraband, are not seizable under the enemy's flag; the 4th section referred to blockades. This article was submitted to the rest of the nations to be adopted or rejected as a whole. Some thirty-eight other nations acceded to the terms of this convention, but the United States refused so to do unless the article was changed so as to add a clause putting an end to war on all private commerce on the high seas. Many of the nations were willing to do this, but England objected, and we have never agreed to the terms of the Declaration of Paris.

times allowed and sometimes said to be contrary to international law. Hot shot is used for the purpose of setting buildings on fire, and chain-shot to cut the masts of vessels. They were both used in our civil war. Explosive balls weighing less than four hundred grams were excluded by the Congress of 1868 in Europe, on the ground that their use caused needless pain, as these balls explode after striking a man and lacerate the flesh. Bomb shells are allowed, and torpedoes are used by all nations in war, though certain publicists claim that the use of means which make death inevitable, or which are calculated to mow down armies are not allowed.

The use of poisoned weapons, or those which tear and lacerate, as glass, nails, jagged edged spears, and the like are forbidden; but cannister shot comes pretty close to this and yet is commonly used.

The destruction of public buildings and archives are forbidden, so the useless and ruthless destruction of property is not countenanced, though sometimes done, as in the case of the burning of Washington by the British. When the destruction of property is for some military purpose, or in case of the siege of a fortified town, the destruction of property is justified. The poisoning of wells and water supplies, and the sending of infectious clothing for the purpose of spreading disease are also strictly forbidden.*

*Hall on Int. Law, Secs. 184-186; Wharton's Dig. Int. Law, Sec. 349.

Sec. 2007. SAME SUBJECT—THE USE OF DECEIT AND STRATAGEMS.—Deception is allowed in war. Thus one army may deceive the other as to the number of their troops, or their situation, as by making dummy cannon, false signal fires to indicate a camp, fictitious telegrams, and the like. But hospital flags, or flags of truce cannot be used for the purpose of deception, and a vessel using the enemy's flag must raise its own before opening hostilities. And soldiers using the uniform of the enemy in order to deceive, must use some distinctive emblem before attacking. So a promise is not to be broken, as where a temporary truce is made, it must be kept.

Spies may be used for the purpose of procuring information from within the enemy's lines, but persons are liable to be put to death if caught. An attempt was made by the Prussians in their war with France to treat as spies persons coming within their lines in balloons, but this is not regarded as tenable.

Sec. 2008. SAME SUBJECT—OBSTRUCTIONS IN HARBORS.—The placing of obstructions in harbors as a means of preventing blockade runners, and also as a means of preventing the enemy's ships from escaping is allowable. Though in some cases protests have been entered by neutral nations, and there is a limit to the extent to which a harbor may be so obstructed, and it would hardly be justified to permanently destroy a harbor as this would affect the rights of other nations; though this was done in the

case of the harbor of Dunkirk, which was destroyed under the terms of the treaty of Utrect.

Sec. 2009. SAME SUBJECT—PROPERTY THAT MAY BE SEIZED ON LAND.—Public property on land, except that used for charitable, religious, and educational purposes, is seizable by the invading belligerent.

Private property on land is generally exempt from seizure, and if taken is to be paid for, or receipted for. But there are numerous exceptions to this rule, and these are sufficient to enable an invading army to usually take what they want. Thus, property directly useful in military operations may be taken, and this might include domestic animals; property may be taken as a compensation for military offences; requisitions for the support of the army may be made when necessary, as an indemnity for keeping order; property secured on the field of battle, ever since Roman times, has been held to be seizable; so a levy may be made on the whole mass of people to punish their rising against the invading army. So the devastation of a country and the destruction of all property may be done when it is deemed necessary as a military measure, but such a course is only justified in extreme cases.

Sec. 2010. SAME SUBJECT—PROPERTY THAT MAY BE SEIZED ON HIGH SEAS.—The enemy's property, both private and public, may be seized on the high seas when found on the enemy's

ships. By the Declaration of Paris in 1856 property of the enemy in neutral ships and not contraband is not subject to capture, but the United States never having acceded to this Declaration is not professedly bound thereby, except as to Italy, with whom we have made a treaty and abandoned the old rule as to the right to take the enemy's goods from neutral ships. The reason for the distinction as to liability to capture of private property on land and sea, is that on land private property is spared on moral and humane grounds, and the fact that unlimited seizure of private property on land would demoralize an invading army. Property on the high seas is more directly tributary to the enemy, and its capture is more effective in destroying the commerce of the enemy, and as a rule, its seizure can be effected without cruelty or the sacrifice of human life.

The modern tendency is to the exemption of private property on sea as well as on land from capture, and the United States has formally advocated that private property be absolutely exempt from seizure on the high seas, whether in neutral ships or not; this is called the "Marcy Doctrine," as it was proposed by him at the time of the Declaration of Paris. But the other nations have not acceded to this proposition, and the old rule is still applicable. As the total abolition of the practice of seizing private property on the sea would mean that all warfare on the high seas be conducted by warships against warships, this would necessitate every nation having a large navy, and per-

haps it would be better to let the old rule stand, as it seems more humane to seize property in a harmless way than to sacrifice human lives.

The vessels of fishermen are not usually captured by either belligerent, as they are deemed to be such humble and helpless characters as to enjoy immunity from capture.

To secure a perfect title to enemy's property captured at sea, the capture must not be effected in neutral waters, as within the three mile limit. And the title to the captured property is deemed to be in abeyance until the legality of the capture is passed upon by a prize court, when if condemned it belongs to the sovereign or state effecting the capture. It is only by the provisions of the municipal law that any part of the captured property goes to the individual captors; though it is quite general for nations to allow the captors a share of the property seized as "prize money." Under the American law all vessels in sight or belonging to one fleet share in the prize money, though the capture was effected by but one ship. It is the duty of a vessel making a capture on the high seas to send the prize in to port at once, or if the vessel captured is unseaworthy, or the enemy is so close as to make a recapture imminent, to destroy her. The question arose in our civil war whether the captor had a right to destroy a captured vessel because their home ports were blockaded and it was impossible to send the prize into port. The Confederates appointed Captain Semmes

admiralty judge, and the captured vessels would be adjudged prizes while at sea, and then ordered burned.

Sec. 2011. SAME SUBJECT—METHOD PURSUED IN PRIZE COURTS.—The enemy have no standing in a prize court. A prize court is for the purpose of holding an inquest on captured vessels and property on the high seas as to the regularity of the capture with respect to the rights of neutrals. The court aims to govern itself according to the terms of international law, but its procedure is different from that of courts of law generally. The United States District Courts are the only courts that try prize cases, but an appeal lies to the higher federal courts. In England a special commission is issued for the organization of prize courts.

Prize courts must be in the captor's territory, or in that of an ally, but the court may pass upon prizes which are in foreign ports. A nation is not obliged to abide by the decision of its prize courts. Neutral nations do not generally allow captured vessels in their ports, and only allow the war vessels of the belligerents in port on account of stress of weather and when necessary to get provisions and supplies. When the vessels of both belligerents come into a neutral port they cannot leave within twenty-four hours of each other. This regulation is designed to prevent a conflict in neutral waters.

Sec. 2012. OF THE RIGHTS AND DUTIES OF NEUTRAL STATES.—The word "neutral" is a

modern term, as in ancient times there was no neutrality, and each nation took one side or the other in war. There are three sorts of neutrality; strict, permanent and qualified.

Permanent neutrality is an exceptional form of neutrality; since 1830, the European nations have bound themselves by treaty not to enter upon the soil of Switzerland or Belgium to carry on war. Qualified neutrality can hardly be said to exist now; it allowed another nation to furnish a belligerent state troops and assistance without becoming involved in the war as an ally. The usual form of neutrality is that known as strict neutrality. When a nation desires to remain neutral in a conflict between other nations, it is bound to guard its neutrality by municipal laws, and keep its citizens from violating their provisions. Thus neutral territory cannot be used for hostilities, and this extends to neutral waters, and it is the duty of the neutral state to see to it that its territory is not so used. This doctrine is carried so far as to prevent a vessel of one belligerent to lie outside of neutral waters ready to pounce upon the vessels of the other as they emerge from neutral waters. For a violation of these provisions the neutral nation is liable, and may then recover its damages against the offending belligerent.

A neutral state is under the absolute obligation to do nothing which will aid one belligerent to the injury of the other. And it cannot now furnish armed assistance as troops or munitions of war, though in

former times this was possible under the idea of a qualified neutrality.

The United States has a very creditable history in the development of the principles of neutrality which now prevail, and many of the principles which were advocated and enforced by Washington, Jefferson and Hamilton are now generally adopted.

There is some question as to whether a neutral state can furnish assistance to another state in war on account of treaty stipulations so to do, the weight of authority seems to be against the proposition. While a neutral nation is bound not to furnish munitions of war to a belligerent, it is under no obligation to prevent its subjects from doing so, and such articles may be sold to the belligerent subject to capture on the seas as contraband of war. A neutral state cannot make a loan to a belligerent, but its subjects may do so.

Sec. 2013. SAME SUBJECT—NEUTRALITY LAWS OF THE UNITED STATES.—By the neutrality laws of the United States, which have been copied by many other nations, it is illegal for our citizens to enlist in foreign wars while in the United States; and it is likewise illegal to hire or engage persons to serve in foreign wars here, as by opening a recruiting office for the purpose; it is also illegal to fit out armed ships or privateers in our territory to aid a foreign state. The doing of any of these acts is made a high misdemeanor and subject to punishment, and the United States can employ the militia to put down any such organizations. We have adhered strictly to

our neutrality laws, and have even forbade the shipment of arms to Canada during war. The English neutrality laws are now more stringent than our own, but were not during our civil war, and as a result we had a claim against them for allowing the Alabama to be fitted out in their ports to operate against our commerce.

Sec. 2014. SAME SUBJECT—WHAT NEUTRALS MAY DO.—Several things are not forbidden to neutrals; thus, a neutral state may give money to suffering belligerents, or subscribe to public loans of belligerents. But this is questioned by some publicists. A neutral may furnish coal to war vessels of the belligerents casually arriving as other steamers, but cannot maintain a regular coaling station for a belligerent. So a government may sell arms to a belligerent in its own territory, subject to capture as contraband while on the way. The theory being, that a neutral nation's natural commerce is to be interfered with as little as possible on account of the war existing between other nations. After the close of our civil war we desired to dispose of our arms, as they would soon be antiquated and useless; we sold a large quantity to France during the Franco-Prussian war. Germany raised the question of our right to do so as neutrals. Some publicists claimed that we violated the principles of international law in so doing. The building and selling of an armed vessel to a belligerent, provided she is not built with the special intent to cruise against a friendly state, and is not commissioned for such service, is permitted; but

such vessel is subject to capture as contraband on the way. This proposition is much discussed, as it is hard to draw the line between a vessel which is built with or without an immediate hostile purpose in view.*

Sec. 2015. SAME SUBJECT—NEUTRAL PROPERTY—HOW DETERMINED.—The neutral character of trade and property is determined by that of the owner. The owner's status depends upon that of his domicile. Neutral trade is to be hindered as little as possible without damaging the belligerents. Prior to the Declaration of Paris there were two chief principles applicable to neutral trade. These were: 1. Enemy's goods in neutral ships were subject to capture, but the neutral ship was paid the full freight. 2. Neutral goods on the enemy's ships were exempt from capture, the captor to get the freight money on such goods. In our treaties with South American states we have held to the general principles of free ships and free goods, and have advocated that all private property on the high seas should be respected in war. But in practice we still hold to the old English rule, that is, the principles prevailing prior to the Declaration of Paris, and put them into practice when necessity requires.

Sec. 2016. SAME SUBJECT—RIGHTS OF NEUTRALS UNDER THE DECLARATION OF PARIS.—By the Declaration of Paris;—Privateering

*Dana's Wheaton's Int. Law, page 536; 3 Dallas (U. S.), 307.

is forbidden. 2. A neutral flag covers enemy's goods except contraband of war, and such goods are exempt from seizure. 3. Neutral goods are not liable to capture under an enemy's flag. These propositions were accepted to by most of the nations, but a few nations like the United States have never acceded to them. Hence the following questions arise:—(i) If one of the signers of the Declaration of Paris is at war with the United States, can such nation take our property out of the neutral vessels of other signers? (ii) If two nations that are bound by the Declaration of Paris are at war, can the one take the other's goods out of our vessels? While the European nations would have the right to answer the above questions in the affirmative, they have given us the benefit of the Declaration of Paris without our signing it.

Sec. 2017. SAME SUBJECT—WHAT IS INCLUDED IN CONTRABAND OF WAR.—All articles fitted directly to aid the enemy in war are contraband and subject to capture. These include gunpowder, arms and ammunition, and the like. Articles of ambiguous use, that is, such as may be used as well for peaceful purposes as for war purposes, are to be treated as contraband if properly destined for military use. Thus horses and saddles, naval stores, and ship timbers may be contraband. The doctrine of contraband articles is a sort of compromise between the rights of neutrals to free trade and free ships and the rights of belligerents not to have aid and assistance furnished

the enemy. Woolsey and the French publicists contend that articles are not contraband unless intended for direct use in war. So provisions, we contend, are not contraband unless going directly to the army or navy of one of the belligerents, and ought to be paid for by the captor so that the neutral does not suffer.

The penalty of carrying contraband articles to the enemy is the confiscation of such articles, as well as all others on board the ship, and the ship itself, provided these all belong to the same owner. The guilty ownership infects all of the owner's property and makes it subject to seizure. And in case of fraud on the part of the owner everything is condemned. We have modified these principles in our treaties with the South American republics.

There is some contention that a government ought to prohibit its citizens from selling or carrying contraband articles, as at present the entire burden of detection is imposed upon the belligerent, but this is not a rule of international law.

The carrying of troops and hostile despatches of belligerents is forbidden, and the penalty for so doing is the forfeiture of the ship; and this has been enforced even where the ship-master has been compelled to carry the troops. During the civil war, one of our vessels stopped a British mail steamer, the Trent, and took by force, two Confederate representatives, Mason and Slidell, who were on their way to Europe to purchase supplies and ships for their government, and while the seizure was in accordance with the principle

just stated that neutral ships should not carry hostile despatches of the enemy, yet Seward, the Secretary of State, disavowed the act of seizure and ordered the men returned. The seizure if upheld would possibly have involved us in war with England, and we were hardly in a position to undertake it at the time. Seward placed his decision on our claim that a nation had no right to take men out of a vessel on the high seas. And this contention has been upheld, and a war vessel is forbidden to take men off of a neutral ship on any ground.

Sec. 2018. INTERNATIONAL LAW IN REGARD TO BLOCKADE.—Under the fourth article of the Declaration of Paris, a blockade must be effective, that is, sufficient to prevent access to the coast of the enemy, and when it is thus effective neutrals are bound to respect the blockade, whether it is commercial or strategic, but not a mere paper blockade, or one not enforced by a fleet sufficient to enforce it. A commercial blockade is for the purpose of shutting off commerce with a town to bring it to terms through failure of supplies. While a strategic blockade is designed to stop all trade with a country. The United States in the civil war set up the most extensive blockade ever known, though previously we had been fluctuating in regard to the right of a state to set up a blockade.

That a blockade be effective or an actual blockade, does not mean that it must be impossible for vessels to run the blockade without detection, but one that

makes it difficult or dangerous to do so. And the fact that the ships of the blockading squadron are driven to sea by storms and the blockade lifted does not destroy the blockade.

The fact of the establishment of a blockade of the enemy's ports is made known to neutrals in either of two ways. 1. By a general proclamation of the government establishing the blockade, as was done by Lincoln in our civil war. After such a proclamation issues neutrals cannot legally sail for a port within the blockaded district. 2. By a warning from the blockading vessels, and ships may not go into such ports after notice given in either way. It is not necessary to give both forms of notice. General notoriety is sufficient notification to such ships as are in the blockaded ports, and they are given a reasonable time to clear and get away; in our civil war the time was fixed at fifteen days. After the blockade is established it is an imputation of guilt for neutral vessels to loiter about the ports that are blockaded; and under the doctrine of continuous voyages set up by England in colonial days we held that neutral ships were subject to seizure when their ultimate destination was a blockaded port, as they had started the practice of sailing to the Bermudas and there transshipping for the southern ports to run the blockade.

The penalty of trying to break a blockade is the confiscation of the ship and all the goods on board, unless the owners of the goods can show that they did not know where they were to be carried. The men on

board are subject to no penalty, there being no personal liability. The liability of the ship continues until she has completed the return voyage. And each trip is taken as a complete enterprise; the guilt of one enterprise is said to be "deposited" or overlooked when the return voyage is completed, so that a vessel cannot be seized for a past offense. And a ship is free when the blockade ceases, though found in the blockaded port. The doctrine being that when the war ends the blockade ceases, and all ships not previously captured are free.

Sec. 2019. OF THE RIGHT OF SEARCH.—The right of search, which is the right of a belligerent to stop a merchant vessel on the high seas and examine her papers and cargo, arose from the doctrine of contraband goods and the endeavor to discover blockade runners. The right does not exist in times of peace except by treaty. We had considerable controversy with England over the matter, as she claimed the right to stop vessels in times of peace to see if they were engaged in the slave trade, and also to take out of our ships and impress British seamen. We claimed that engaging in the slave trade was not illegal except by municipal law of England she could only stop and search her own ships, but England claimed that she could stop all ships to ascertain what was their nationality. While England has never disavowed the right to the impressment of seamen, it is never likely to happen again, as men are secured by volunteering now, and not by coercion.

Sec. 2020. OF EXTRADITION.—The right of one state to demand a fugitive from justice who has fled to another state is of the greatest importance, and is the subject of many treaty stipulations in modern times.

The necessity for stipulations being made as to extradition arises from the fact that one state has no jurisdiction or sovereignty in the territory of another, and could not pursue after or remove a person accused of crime from the jurisdiction of another state without the consent of that state, and there being more or less jealousy between independent nations there was little comity in this regard. But under modern civilization it has become customary in the interest of justice for one nation to surrender persons accused of certain crimes under provisions and safeguards which protect both the accused person and the sovereignty of the nation so surrendering the fugitive from justice.

The grounds upon which the doctrine of extradition is based are: that it is the duty of a nation to protect itself, as all criminals would flock to a nation which refused to deliver them up to justice, and nations generally recognize that they owe a duty to society to protect it against criminals.

While extradition is general, it is not obligatory upon a government to send back an escaped criminal unless such a stipulation has been made in a treaty; and it is not customary to ask it unless the case is covered by treaty stipulations. A nation may give up a fugitive voluntarily, as we have done in cases.

Extradition is a political and not a judicial act, even where the matter is covered by treaty stipulations. The courts that are called upon to examine as to the legality of an extradition case, only report their findings to the government and the executive does as he sees fit in each case.

Most nations refuse to surrender persons accused simply of political offenses, on the ground that the meaning of a political offense varies in the different states and there being no common ground upon which they can agree it is best to let the person go free. Thus a person may be imprisoned for life in Russia for what our citizens customarily do every day and are applauded for, so that it would not be policy for us to surrender a person to suffer punishment which we do not sanction. But assassins and murderers cannot claim to be political offenders simply because they are banded together to slay the heads of the various governments; such persons are, and ought to be, extraditable. We have made treaties to this effect. The destruction of buildings by explosives, though intended to terrorize the government, is not to be regarded as a political offense, and such offenders are extraditable.

We have had some controversy with England as to whether a person extradited for one offense could then be tried for another, under the terms of our treaty with them. Since 1890 we have a new treaty with England governing the matter, which largely increases the number of offences for which persons may be extradited and provides that an extradited person cannot

be tried for another offense until he is first returned to the country from which he was extradited. The offences for which a person may be extradited include, manslaughter, embezzlement, breach of trust, rape, piracy, revolt on shipboard, and the like.*

*See Moore on Extradition and Interstate Rendition.

# LEGAL ETHICS AND PRACTICAL SUGGESTIONS TO YOUNG LAWYERS.

## CHAPTER I.

### THE SUBJECT DEFINED AND CLASSIFIED.

Sec. 2021. MEANING OF ETHICS.—Ethics in its general sense is the science of human duty, and may be said to include two things, first, an investigation into the nature and constitution of human character; second, the formulated system of rules and principles concerning duty, whether true or false, which generally regulate human conduct. Ethics mean character,—and, particularly, good character,—as distinguished from intellect. Hence, ethics may be said to include the sum or aggregate of the rules of duty, or right living.

Ethics and morality are to be distinguished, since morality represents existing facts, while ethics is rather the scientific hypothesis for the explanation of existing facts.

In a more limited sense ethics is a particular system of rules and principles concerning moral obligations and regard for the rights of others, whether true or false; and when these rules are applied to a single class or branch of human actions and duties, we have,

for example, "social ethics, "medical ethics," and *"legal* ethics."

Sec. 2022. ETHICS NOT AN EXACT SCIENCE.—While some philosophers, as Kant, distinguish between pure morals, or the science of the necessary moral laws of a free will, and *ethics* properly so-called, which considers those laws as under the influence of the sentiments and passions and subject to the changes incident to the progressive ideals of civilized beings; yet, in practice and in fact, there are no fixed and determinate or absolute rules of duty which can be appealed to for the regulation of human conduct and actions under all circumstances. There is no exact ethical code. And the subject of ethics, whether as a matter of pure morals, or the general regulation of human conduct, has never been the subject of legislation or judicial action. The ethical code, so-called, is a changeable one; though there may appear to be underlying principles which seem to compel the rule, and to which certain writers may point to indicate the Divine order of human affairs, which makes it impossible for mankind to mistake the right and choose the wrong. The ultimate solution of this question—as to the innateness of morals and rules of conduct—like the question of the natural or legislative origin of laws, is one that may well be left to the decision of each individual.*

*To the average morally educated man, the distinction between right and wrong as to everyday matters is so palpable

Sec. 2023. LEGAL ETHICS DEFINED AND EXPLAINED.—Legal ethics may be defined as that branch of science which concerns itself with the moral

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that he customarily reasons that his sense of right and wrong must be innate rather than cultivated. But let us put a few questions to this God-like creature with the Divine gift of distinguishing right from wrong. Do you claim to have the same or a better moral sense than the average citizen with whom you associate? Do you claim to have the same or a better gift of distinguishing right from wrong than the average individual of the last century? or of ten centuries ago? If you have a better moral sense than your neighbors, or those of the past, how do you account for it on the theory that all moral sense is innate rather than developed? If you have the same moral sense as others had in times past, how do you account for the innumerable errors and atrocious crimes committed in the name and by virtue of the *morality* and *conscience* of the past? How do you account for the fact that at the present time there is so little unanimity as to important matters of morality and conduct between individuals and nations upon the same plane of development? What does your Divine gift of distinguishing right from wrong indicate to you as to the rule of right in your possessing a million dollars while thousands of your fellow mortals are starving? in your devising laws and rules of property which must inevitable segregate the necessities of life into the hands of the few and make industrial slaves of the many? in your claiming for yourself rights, privileges and immunities which you will not and dare not extend to others? When you have answered these questions to your own satisfaction then decide for yourself whether ethics; moral principles; your moral sense, or the moral sense of mankind as expressed in the formulated principles and rules of right living are not mere matters of opinion, changing with time, place and circumstance; changing with the progress and civilization of mankind—and with the ideals and habits of the human race.

duties and obligations growing out of the professional relation existing between that class of men known as "lawyers" and the rest of society.

It is as true of this branch of ethics as any other, that it is not an exact science. Professional conduct, like other forms of ethical affirmation is largely a matter of opinion, though here too there are underlying principles that seem to compel the rule.

But as regards the moral duties and legal duties there is this distinction which must always be borne in mind: that positive, or declared law is always right, though it may be or seem iniquitous from the moral viewpoint of the individual, or a class of individuals. Obedience to the law is a higher moral duty in such cases than obedience to what one may deem the law ought to be. This is so not only because it is necessary to the establishment of peace and order in society, but also because it is clear that the internal mentor, styled "conscience" is a very fallible guide, as the oppression, injustice, superstitions and crimes of history, based upon the dictates of conscience, abundantly show.

Legal ethics refers simply to the professional conduct on the part of those who assume to practice law, and may also be called *professional* ethics.

Sec. 2024. CLASSIFICATION OF PROFESSIONAL OBLIGATIONS.—The professional obligations and rules of conduct governing a lawyer may be classified or divided as follows: 1. Those

which govern and concern his relations to the public or state. 2. Those which concern and regulate his conduct and relations with suitors or clients. 3. Those which govern and regulate his conduct and demeanor towards the court; that is, the judges and juries. 4. Those which should control in his conduct and relations with the bar, or his professional brethren. Each of these divisions will be given some consideration herein.

Sec. 2025. EXTENT OF SUBJECT OF LEGAL ETHICS.—It should not be understood from the classification of the subject in the preceding section that the moral duties of the legal profession are to be limited in their scope to those which simply concern their conduct in professional matters, and that if these are scrupulously adhered to the morals of the lawyer in other matters are immaterial. Thus it has been said:

"Public confidence in a lawyer makes up at least a very large part of his capital stock. Of course this public confidence reaches out into every element of the lawyer's makeup. It touches not only the moral side of him, but the educational side of him as well, and particularly his professional education. But the public want to believe that the man into whose hands they entrust the interests involved in a particular litigation shall be a man in whom they can trust as one who will be honest and faithful to them. Mr. Sharswood, of the Supreme Court of Pennsylvania, said in his little work on 'Legal Ethics:' 'Let it be re-

membered and treasured in the heart of every student that no man can be a truly great lawyer who is not in every sense of the word a good man.' Another has said, 'The lawyer must possess that chastity of honor which feels a stain like a wound.' "*

Dr. Warren, the author of "Ten Thousand a Year," "Law Studies," and "Duties of Attorneys," all valuable books for a law-student or lawyer, has well said in regard to the responsibility of the lawyer: "Whatever our talents or acquirements, whatever our tempers and dispositions, whether amiable and yielding, or exacting, irritable or overbearing . . . we may have to take you into our confidence and open to you the most secret recesses of our hearts. Our honor, our life, our liberty, our property and those of our friends are endangered or outraged, and to you we must flee." And it well said that there is no class of men, unless it be those whose direct occupation is the teaching of morals, who have a wider influence upon the world at large than the members of the legal profession, as to them are committed the dearest interests of the public; and to them the people turn not only for protection under the law, but to see to it that the law keeps step with the progress of the race in the protection and establishment of rights.

Sec. 2026. STANDING OF THE LEGAL PROFESSION WITH THE GENERAL PUBLIC.—

*Lectures by Judge Lane to Law Students of University of Michigan.

"There are two attitudes which we may observe in public opinion as to the profession of law. One of them is not very commendatory, and our profession has been the butt of as much ridicule and sarcasm as any other profession. I do not think that this is the general opinion of the public, but that it does prevail to some extent there is no doubt. There are some members of our profession who are black sheep and consequently they are the ones most noticed and most talked about. There are men who advertise as divorce lawyers or who run to the county jail to solicit patronage as soon as a man is arrested, and such practice on the part of members of our profession does give justification for criticism. But the body of the profession are not engaged in that sort of practice. Again: people sometimes assail the bar because they feel that the lawyer can take care of himself. The lawyer is a public character, is supposed to be prepared for all the shafts commonly aimed at a public character, and so people recognize that he can take care of himself.

"It is true, too, that the very nature of his work —having an antagonist continually at him while he is at work—is a condition which we must take into consideration when we are thinking about this. When a man is under that sort of pressure all the time, it would be strange if criticism of his conduct did not sometimes arise.

"But there is a better view of the profession. The fact that people in general do have a more serious

and just view of the profession than is indicated from what I have just said, is true when we come to think that they do really put those interests which are most valuable to them into the hands of the lawyer almost without reserve, and it is to the credit of our profession that it is very rarely indeed that we find that trust betrayed.

"It is true that the legal profession has a high standard of morals. There are individual exceptions, but the profession as a profession certainly has a high standard of morals. It is one of the requirements of admission to the bar that some brother must certify that the applicant is of good moral character. Its literature is pure, too. It is very rarely indeed that you can find anything in the literature of the law—text-books, reports, periodicals—that will make you ashamed of your profession."*

Sec. 2027. STANDING OF THE BAR IN AMERICA AS TO POLITICAL AND EDUCATIONAL MATTERS.—From statistics compiled by different persons in recent years as to the number and percentage of lawyers who have held the prominent political offices in the gift of our federal and state governments, the following facts appear:

"That out of the 3,122 Senators in our national legislature who had occupied that office 2,068 were lawyers—more than 66 per cent. Out of 11,889 members of the lower house, 5,832 were lawyers—about

*Lectures by Judge Lane.

50 per cent. Out of 24 Presidents, 19, or 80 per cent, had been lawyers. Of the cabinet officers, there were in all 95 per cent lawyers—I think 218 out of 232. So the investigation ran on, through the legislatures of the several states and the higher offices of the states, and while the proportion here was not so high, yet when we come to consider the proportion of lawyers to the general population it seems to be remarkable and almost startling to find what a large percent of members of these various bodies have been lawyers."

In his "American Commonwealth," Mr. Bryce says, "In education the bar of the United States ranks high. Most of the lawyers have had a college training and are by the necessities of their employment, persons of mental cultivation. In the older towns they, with the clergy, form the intellectual elite of the place, and they worthily preserve the standard of the Roman, English and Scotch bar. Fifty years ago the bar of the United States had reached a power and social consideration relatively greater than the bar has ever held on the eastern side of the Atlantic."

Sec. 2028. WHAT IS THE PURPOSE OF THE LEGAL PROFESSION?—A lawyer is an advocate, and the essential principle of advocacy is said to consist in the substitution of persons professing special skill and learning in litigated matters for the actual litigants, to do, on their behalf and in their stead, all which they, if possessed of sufficient knowledge and ability, might do for themselves with fairness to their

opponents. Such advocates are also entitled to charge and receive a reward for the rendition of such services, as will justly compensate for their preparatory study as well as the actual labor employed*

The fact that an advocate or lawyer is ready to take either side of a litigation for hire, does not necessarily show that he is venal, nor that his attitude contravenes the principles of sound morality. It is sometimes hard to say on which side right and justice lies even after a careful litigation or investigation, and hence it is evidently necessary that such an investigation be made before a decision on the merits of the case is given. The lawyer is simply retained to advocate or present his side of the controversy, and to assist in providing and arranging the materials from which his client's side of the case is to be judged.

Sec. 2029. OF THE HISTORY AND DEVELOPMENT OF THE LEGAL PROFESSION.—Our American system of advocacy is derived from the English system, though we do not follow the divisions of the profession into barristers, solicitors, etc., prevailing in England and her colonies. The history of advocacy in England may be traced back as far as Alfred. The first licensed advocates were called "serjeants."

In Greece there was no position which corresponded to that of the lawyer of to-day. Parties acted for themselves. Later, however, there grew up

*See the first chapters of Warvelle's "Legal Ethics."

a class of people who wrote speeches for their clients and delivered them. In Rome the advocate, when first he became known to the Roman state at all, was a man more politician than advocate, and simply took the position to advance his political ambitions. It was really a political office. "Patron" and "Client" are the terms suggesting the relation of attorney and client under this system. But it came afterward, under the code of Justinian, to assimilate more closely to the relation of the lawyer, as we now know him. In France the lawyer has for a long time held a very high position in the public estimation. At one time the profession was a branch of the nobility, and it was very difficult to become a lawyer. In England, while legal education has not taken the same course as in this country, yet membership in the bar there has always required a long course of preparation. The English bar has always occupied a very high standing, and many of the liberties which we enjoy are the result of the influence of the wise lawyers and judges of the past.

Sec. 2030. OF THE AUTHORITIES OR WRITERS ON LEGAL ETHICS.—The chief source of legal ethics to the average lawyer are the customs and practices prevailing in his local jurisdiction, in addition to what his own general knowledge would indicate to him to be right and proper conduct under the circumstances. It is to the credit of the profession that it is seldom that a lawyer does wrong

as to his professional conduct through ignorance upon the subject.

Among the writers upon the subject of professional conduct may be mentioned Judge Sharswood, whose work is entitled "Legal Ethics;" George W. Warvelle, is also the author of a small book on "Legal Ethics." Pollock's Essays on Jurisprudence contain many valuable suggestions along the line of professional conduct; and so far as the rules regulating professional conduct are enforced by positive law or regulations, reference may be found to them in any of the commentators on municipal law. In the development of this subject, we have made frequent use of the principles and suggestions laid down by Judge Victor H. Lane, in his lectures to the law classes of the University of Michigan.

## CHAPTER II.

### THE LAWYER'S DUTIES WITH RESPECT TO THE PUBLIC OR STATE.

Sec. 2031. GENERAL NATURE OF A LAWYER'S DUTIES TO THE PUBLIC.—The duties which one who has espoused the legal profession owes to the public or state by reason of his profession are of a more varied sort than those of the ordinary individual. This results from the fact that he has embraced one of the learned professions, and one which particularly concerns the political and social welfare of the community. Our age is one of law, notwithstanding the many lawless acts which are still committed which the statute law is powerless to adequately prevent or punish. The lawyer being versed in the doctrines of the law, knowing its strong and weak places, becomes, naturally, one of the pillars of the state in upholding the laws enacted, and in devising others to meet the changing conditions of social, commercial and industrial life. Hence the lawyer is not only interested as are other citizens in formulating and procuring wise and just laws to be enacted, and seeing that they are faithfully administered, but he should become a leader and educator in this regard among his fellow men. Because of this a lawyer, of the right kind, may have a superior claim to

political preferment in times when important legislation is to be, or should be enacted. But nothing but contempt can be expressed for the professional sycophants, who have sacrificed their high grade abilities to gain the patronage of corporate interests, and consent to run for office in order the better to protect their patrons from becoming subject to reasonable legal regulation.

A lawyer is also directly in line for promotion to all those official positions which none but those trained in the law can expect to hold, including all the positions incident to the judicial branch of the federal and state government; judgships, prosecuting attorneys, and the like. In these positions the lawyers should have not only high moral and intellectual endowments, but also a courageous and progressive spirit to withstand alike the temptations of those who would directly or indirectly use him to tamper with justice, and the seductive allurments of an aspiring ambition.

The general public can never know how many decisions of the courts, and how many ostentatious acts of public prosecutors are made at the dictates of ambition, and even as the result of pique, pride, jealousy and revenge. It is believed that there are not so many decisions based upon other than legal grounds now as in the past, but the love of money, and the desire to secure political or social preferment regardless of the means used is occasionally corrupting a judge or official connected with the administration of justice, and without an awakened public conscience to dis-

approve the action of, as well as punish such offenders, grave fears may be well entertained for the stability of our institutions.

Sec. 2032. THE LAWYER'S RESPONSIBILITY TO THE PUBLIC IN THE ADMINISTRATION OF THE LAW.—"The lawyer is usually a member of the community whose influence is more potent than is that of the average man, and so he should be more careful of his conduct and the way in which he discharges his duties as a citizen by reason of this fact. It may be said that there is no branch of our form of government more important than is that of the administration of the law, and the lawyer is primarily responsible for that. The measure of responsibility upon him is very much beyond that of other members of the community. The literature which pertains to the administration of law is all his own. The members of the judiciary who administer the law are chosen from our profession. So that we may be said to be responsible for the administration of the law in the communities in which we live, as well as in the country at large. We should have an understanding and knowledge of the law, and knowing what the law is, we should be careful to see that it is properly and correctly declared. The lawyer who loses sight of this duty of his to do what he can to see that the law is properly declared has lost sight of one of his most important duties. It is easy under some cir-

cumstances to lose sight of these duties. There comes a time in the practitioner's life, and it is not infrequent either, when it is somewhat easy for him to overlook this. He would bend the law in the interest of the contention which he makes. He cannot afford to do that and he ought to be always very careful that he does not do that. One of the charges which are oftenest brought against the administration of law is that we have judge made law. If the judges make law, it is ordinarily true that some man or men at the bar are responsible for it. It is not often that a judge makes a declaration of a proposition of law except he makes it upon the invitation of some member of the bar. You cannot shield yourself by saying that after all this question was submitted to the court. You have not discharged your duty when you have made an argument to the court for the declaration of law which you do not believe in, it is infinitely more important that there be a correct declaration of law than that there be a failure of justice in a particular case.

"Temptations for the violation of this duty are very strong many times. They press upon us by reason of practices which ought not to be permitted. Take a lawyer who has put himself in a position of having a large fee depend upon his success. He will lose sight of these principles when trying to earn his *contingent fee.*

"So it is true that he finds public opinion running in a particular direction. He thinks if he can put himself in the line of public opinion he can gain some-

thing for himself. He can never afford to sacrifice his own conclusion as to what his duty as a lawyer is to the clamor of public opinion. We ought to be strong enough to stand in the face of public opinion where duty calls us to stand.

"Many times our own friends appeal to us very strongly in the administration of justice to do something which is not in the interest of justice and we ought to be very careful under these circumstances. The lawyer cannot for a moment forget, when we think of it from the purely selfish side, that his business is a life work. He is not practicing law for a day, but he expects to make that his life work, and looking at it from that point of view you cannot afford to do less than your duty as a lawyer. So I want to warn you against permitting yourselves to be used when there is an opportunity for winning popular acclaim from the "hangers on." You will find that there is sometimes a temptation to please these people who are sitting around the court room. You ought to lose sight of these people. Keep before you your duty as lawyers and do not seek to gain notoriety by permitting yourself in speech or manner to pander to them; it is a weakness to do that. The only anchor for the lawyer against a weakness of this sort is that he attach himself to some well grounded principles and build his life as a practitioner up to these."*

*From Lectures to Law Students of Michigan University by Judge Lane.

## CHAPTER III.

### THE RELATION AND CONDUCT OF THE LAWYER TO HIS CLIENTS.

Sec. 2033. THE ETHICAL JUSTIFICATION OF THE LAWYER WHO IS ON THE LOSING SIDE OF A LEGAL CONTROVERSY.—While it is true that a lawyer is not to constitute himself judge of his client's case in the first instance, but is rather a helper in presenting the facts so that others may decide, and at the same time to carefully scrutinize the facts and acts of the other side so that no advantage may be taken of his client, yet the question is frequently raised as to the ethical justification of a lawyer accepting a retainer on what is styled "the wrong side of an action," whether civil or criminal. The individuals who argue from the fact that a lawyer is ready to be retained on either side of a controversy that he is therefore indifferent to the right or wrong in the matter, lose sight of the fact that it is one of the fundamental principles of Anglo-Saxon civilization in the rendition of justice, that every one is entitled to be heard and have his side presented—in court—in the best possible light, and that so far from this policy resulting in making a travesty of justice, it is deemed to be the only enlightened way to secure the equal and exact administration of justice known

to man. In this view it is not for the lawyer to decide whether his client is in the right or wrong of the controversy, though if he does find sufficient to convince himself of the justice of his client's side he will be the more strenuous advocate. But we do not think that it is a lawyer's duty to decide for himself in the first instance whether he has the right or wrong side, whether considered from a legal or moral standpoint. It is enough for him to know that his client is engaged in a controversy, and that the other side will be, or have the equal right to be represented by a skilled advocate, and that his services are necessary to properly present his client's side of the matter to the tribunal authorized to decide the controversy. This seems to be the only practical view to take, for if a lawyer were to conclude that it was his ethical duty to first decide whether his would-be client's were in the right or wrong he would be usurping the position of judge and jury and putting his own individual opinion in the place of that of the authorized tribunal alone entitled to decide. Again, suppose the lawyer should conclude that the side presented to him was the "wrong" side, then what appeal would the suitor have? And he is legally entitled to an appeal. Other members of the profession hearing that the case had been offered to one of their number and refused, would be likely to refuse it also, as a result of which the suitor would be without the assistance of those whose primary purpose as well as duty is to assist suitors.

Sec. 2034. SAME SUBJECT—ANOTHER VIEW.—Another side of this controversy is that advocated by Judge Lane, who says: "It is true that there is a wrong and a right side to every controversy in court. The fact that the parties have come into court shows that they have something that they cannot agree to and ask the court to see which is in the right. Now the question naturally suggests itself as to whether the lawyer as a lawyer should determine this question in advance. In other words, is he justified in going into court when he is not satisfied in his own mind that that which the client asks is that which the client is entitled to. This is a question which has given rise to a greal deal of discussion. I may say that it is certainly not always true that you should refrain from representing a client in such a case. An attorney may be justified in making a contention for the client, but he is not justified in making a contention that he does not believe in. He may render very valuable services to his client and never make a contention that he does not believe in. It is his duty, even though public opinion may be very seriously against him, to stand for him and see that if he is convicted that he is convicted according to forms of law. If he goes outside of that and contends for what he does not believe in he is out of his position.

"Occasionally we run across a controversy in which there seems to be a little of equity on either side, but as it finally develops we ordinarily find it to be true that there is what we know as a right and a wrong

side; but it does not follow because this is true that the attorney who happens to be upon the wrong side is out of his proper place. Not that the attorney is justified in accepting a retainer from every person who comes to him. He certainly is not. Particularly is this true in civil cases, and in those civil cases where a man is asked to inaugurate the litigation by beginning the action. He is under no obligation to begin that litigation simply because he is asked to.

"Neither do I mean to say that because he is doubtful of the right he should decline a retainer of that kind. The very fact that he is doubtful would put him in a situation ordinarily where if the matter in controversy were of importance to the man who comes to him he would be very certainly justified in accepting a retainer, that the issue might be tried and the question investigated and the rights of the parties determined. Again: the controversy may seem too insignificant or may seem to be prompted by spite against the defendant; these are considerations which may always determine your employment.

"In many controversies there are two questions: 1. Is the plaintiff entitled to recover? 2. What shall be the measure of his recovery? Frequently it is conceded that the plaintiff is entitled to damages and the only question is as to the amount of the damages. Here of course you are quite free to undertake to defend against a wrong measure of damages."*

*From Lectures to Law Students.

Sec. 2035. SAME SUBJECT—IN CRIMINAL CASES.—There is little controversy as to the right of an attorney to defend a person accused of crime irrespective of the question of guilt or innocence. In this regard Judge Lane remarks: "Ordinarily such a prosecution is to be instituted only by a public official. And difficult questions do not arise there unless it be where an attorney is called in by the state's attorney to assist in the prosecution. If you have conscientious scruples against employment of that kind, do not communicate them to the court in a public way, because that may operate to the prejudice of the accused, but confide them to the court in private and leave it to the court to decide whether you shall nevertheless act for the state.

"When an attorney, however, is asked to defend a criminal case he is in a somewhat different position from an attorney who is asked to defend or institute a civil suit. Here he is certainly justified in going in and making such a defense for him as the client has under the law. In a civil case a party undefended by an attorney might be mulcted in a much larger sum than he ought to pay, even though it is clear he ought to pay something. Similarly of one charged with a crime; here you may have very positive convictions as to the guilt of the accused, but it does not follow from that that you are not justified in making a defense; you may, and within such rules of law as are applicable to cases of this sort. However, if you are convinced the man is guilty, it is your duty to tell him

so and let him know your attitude, as it is true that a man with preconceived notions of that kind can hardly have quite the zeal in defending his client that he would otherwise have. And as a general rule the attorney and client should understand each other quite thoroughly, whatver the litigation.

"As to criminal cases, then, the rule may be stated thus: If a person is charged with crime, you are justified in defending him and seeing to it that if he is convicted he is *not* convicted in violation of some rule of law."

Sec. 2036. THE LAWYER'S DUTIES AS RESPECTS GIVING ADVICE TO HIS CLIENTS. —When a lawyer is simply asked for advice by a client it is his duty to give it fairly and honestly as he understands it, though such advice may be contrary to what the client desires and may be the means of losing the giver of the advice a lucrative employment. Many clients desire to be upheld in their contentions as to the law applicable to the facts, and are willing to take chances on the result, but the lawyer cannot afford to do this, his advice must be unbiased and consistent with the law as he understands it. If this practice is not followed, the lawyer will find that his clients come to regard his counsel at what it is really worth—nothing, and in time go elsewhere with their business. This does not mean that if the suitor has a case which he desires brought at all events, or is defendant in an action and needs your services that

you should refuse to assist him, because it is your best judgment that his is not the meritorious side of the litigation.

Judge Lane states that an attorney should "never advise a client to go into a losing fight just because he wants to be advised that way. And this prinicple controls when we come to consider questions of review. If you lose at nisi prius and you think there is reason for taking the case to a higher court or obtaining a new trial, you may, of course, advise your client, even against his own conviction, that he should move for this review; but do not, for the purpose of postponing an evil day which must come in the end, abide in the trial just because your client wants to. If you believe that you were wrong in your advice to your client under which you went into the nisi prius trial, confess it and do not go further in the trial unless he positively insists."

Sec. 2037. IT IS AN ATTORNEY'S LEGAL RIGHT, IF NOT HIS DUTY, TO REFUSE RETAINERS IN CERTAIN CIVIL CASES.—An attorney who acts with circumspection will not indiscriminately accept retainers in all classes of cases and from all persons. An attorney, like a magistrate, may, if he so chooses, prevent by timely advice, the bringing of many small and vexatious suits which can only end in costs and ill-feeling. It is an attorney's unquestioned right to refuse a retainer in any civil case in which his judgment and discretion indicate that

it is best for his own interests not to be connected with. It is not advisable for any attorney to be continually on the wrong, or losing side, and he has a right to select his cases with this fact in view. Again, by bringing suits indiscriminately a lawyer may not only get in bad repute in the community but also with his professional brethren.

Sec. 2038. AN ATTORNEY CANNOT, PERHAPS, JUSTLY REFUSE TO REPRESENT A PERSON ACCUSED OF CRIME.—The right of an attorney to select his cases and refuse employment is said to be limited somewhat as respects criminal cases. Here there is the gravest need of the defendant being represented by counsel, and it is the duty of an attorney not to refuse employment by such person without a good excuse. The question also arises where the defendant is impecunious and unable to engage counsel, and the court appoints some member of the bar to defend him. In such cases the attorney appointed being an officer of the court cannot refuse to act. But in practice the court seldom appoints any one not willing to act for the accused.

Sec. 2039. WHEN A LAWYER IS ALREADY RETAINED IN A CASE, HE SHOULD SO INFORM AN APPLICANT FOR HIS SERVICES IMMEDIATELY.—Where an attorney is engaged generally or specially on one side of a litigation, and is approached by the other litigant, it is his duty to tell such litigant at once that he is acting for the other

party, and not wait until he is informed of the facts on the adverse side, before making known his previous employment. So, whenever for any reason the interests of the attorney become adverse to those of his client it is his duty to tell the client of the fact and give up the employment, or refuse to accept it if not already engaged in.

Sec. 2040. WITH HIS CLIENT AN ATTORNEY SHOULD OBSERVE A JUDICIAL ATTITUDE, AND NOT ADVISE ANYTHING CONTRARY TO LAW.—The lawyer, in his office, should observe a judicial attitude to his clients, and different from that which he may use in court, where he is the advocate and defender of his client. It is not best for the attorney to become the keeper of his client's conscience to the extent to persuade or allow the client to do acts favorable to his side regardless of their truthfulness or honesty. So an attorney is not generally justified in taking steps that are merely intended to delay litigation, though such delay is in the interests of his client. But where such delay will eventually assist the client and also the other party such measures may be justifiable.

Sec. 2041. SOME THINGS AN ATTORNEY SHOULD NEVER DO FOR HIS CLIENT.—An attorney is never justified in going direct to the opposing litigant and making a settlement with him without consulting the opposing attorney. Such an action is highly unprofessional, and cannot be jus-

tified on the ground that it is in the best interests of his client to do so. This is nothing more than taking a mean and underhand advantage of the opposing counsel, and one who practices it merits the contempt of his fellow members of the bar. It might be said in passing, that whenever a client is foolish enough to thus treat with the other side for settlement in the absence or without the knowledge of his attorney, he usually gets mulcted as he deserves.

It hardly needs stating that an attorney cannot be justified in sacrificing the interests of his client on account of extraneous influences. Thus, the fact that your side of the litigation is unpopular, or your client is poor while the other side is rich and influential, and your personal interests might be momentarily advanced by slighting your case, must not be allowed to affect your conduct or efforts in your client's behalf. Your reputation depends upon your absolute honesty and consistency in serving the interests of your client under all circumstances.

It is likewise axiomatic that an attorney is never justified in making a bad or erroneous use of the law in order to win the suit for his client. It is unfortunate that it is the practice of some attorneys to win at all events, and if the rule can be twisted, or the law subverted, they count themselves all the greater advocates. It is undoubtedly true that certain rules of law prevailing in some jurisdictions were thus established, and perhaps will not be eradicated until the legislature takes a hand at their demolition.

An attorney is not justified in entering into a criminal prosecution for the purpose of bolstering up a civil action which he intends to bring when the criminal matter has been disposed of. Where such course is pursued by one who is acting in the position of public prosecutor, it is all the more reprehensible, as it makes such attorney personally interested in the event of the action, and a partisan in every sense of the word.*

Sec. 2042. OF THE RIGHT OF AN ATTORNEY TO RECEIVE COMPENSATION FOR HIS SERVICES.—At the beginning of the professional avocations lawyers and physicians were not allowed to charge for their services in the modern sense. They had no legal claim, but had to depend upon gratuities. But this has long since been changed, and the lawyer and physician has the same right to charge and recover for services rendered as any other laborer, agent, or representative. In the past the services of an advocate were rendered either for political reasons, or by reason of relationship and the like. In modern times the relationship between attorney and client as to payment for services rendered by the attorney are regarded as other contract relations. When no compensation is agreed upon, a reasonable one is implied, and whether express or implied payment for such services can be enforced by legal process. But until

*Rush v. Kellogg, 2 Barr. (Pa. St.) 189.

quite recent times, in some states the rule was otherwise.

Sec. 2043. HOW THE AMOUNT WHICH AN ATTORNEY MAY CHARGE FOR HIS SERVICES IS DETERMINED.—As a general principle, in the absence of extortion, the amount which the attorney charges as his fee for legal services rendered his clients raises no ethical question, and the attorney is at liberty to charge according to his own idea of the value of his services. Perhaps in no other profession, except that of medicine, does the fee of individuals for the same class of work vary so much. One lawyer may charge twenty-five dollars and consider himself well paid, while another who is considered a little higher up the professional ladder will receive one thousand dollars for a similar service.

When the question as to what is a reasonable compensation for such service under the circumstances of the particular case, is raised, as it sometimes is, then the professional skill and standing of the person employed, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case —as well as the result—must all be taken into consideration in fixing the value of the services rendered.* In other words, an attorney has a right to measure his compensation, having in view the responsibility which he assumes, and that involves of course the magnitude

*Engstrom v. Boardman, 37 Mich. 14.

of the controversy, what it means to either of the parties and as well the questions involved, whether difficult of solution, new questions which require great legal skill for correct determination, or whether they are questions of an ordinary character; and then the result of the controversy may properly be taken into consideration.

Considerable criticism is made of the legal profession, and many jests made at the expense of the members of the bar, because of so-called excessive charges for services rendered. Perhaps because of this many persons and agencies insist upon a written agreement as to fees before the services are rendered, and we have never heard of a lawyer who is not willing to stipulate in advance as to what his charges will be. It is likely that those responsible for these criticisms and jests take but a superficial view of the services rendered by the attorney in the case which they have in mind as involving an excessive charge on the part of an attorney. Such persons are apt to think that a lawyer's compensation, like the ordinary laborer ought to be governed by the actual time employed in the client's behalf, and overlook entirely the fact that a great deal of time has been employed by the attorney in fitting himself to practice law, and that considerable capital and expense are also connected with his calling, all of which must be taken into consideration in estimating the reasonableness of his charges.

Sec. 2044. SAME SUBJECT—OF THE LIMITATIONS IMPOSED UPON ATTORNEYS AS

TO FEES.—While an attorney has considerable latitude in the matter of his fees, he should never make his charge excessive simply because his client can pay, and perhaps will pay without protest. It is perhaps but reasonable that those who are very poor should be entitled to have their limited resources considered in fixing the professional fee to be charged for services rendered them, and, on the other hand, a lawyer may sometimes be justified in asking those abundantly able to pay well for his services, more than he would if their resources were limited. An attorney, so long as he practices no fraud upon his client, is free to make any agreement, however advantageous to himself, as to his fees, that his client will consent to. Thus he may accept a stipulated sum as a general retainer for a specified time, or he may enter into a special contract for his employment, and such contract will determine his rights to compensation. Again, he may make a contract under which he shall be paid a specific sum, or his contract may be one without any compensation being mentioned but the contract being such as to indicate that one is implied. In the former case he may recover compensation on the contract; in the latter on a quantum meruit. He may, too, make a contract by which his compensation is contingent upon recovery of judgment for his client. There are, however, various forms in which this question of contingent fees may arise: an attorney may contract that he shall have compensation of say $1,000 if he recovers $10,000, and $500

if he recovers less; or there may be a contract that he shall recover a specific sum if he recovers judgment, and nothing at all if he fails. Between these two limitations the range may be indefinite.

The other sort of contingent fee is that where the attorney is to accept compensation dependent upon the amount of the judgment, the compensation to come out of the judgment; for example, he is to get 50 per cent of the recovery. In a very few states he may not make a contract which under the old common law would be champertous or maintenance.

Sec. 2045. OF THE OBJECTIONS TO CONTINGENT FEES.—While it is now not illegal for an attorney to accept employment upon a contingent fee, or stipulated interest or percentage in the judgment or amount recovered, and many cases are taken by reputable lawyers on such a basis, there are grave objections to the practice. Some of these are pointed out in the case of Ex Parte Flint,* where it is said, that the attorney puts himself in a position of suspicion when he consents to take a contingent fee. That was true possibly more then than now. Contingent fees are now permitted under the laws of at least most of our states. The contingent fee is a fee where the attorney consents to measure his compensation by the size of the judgment which may be recovered. If he recovers nothing, his fee is nothing. It practically puts the attorney in a position where he is a part-

*2 Wall. Jr. 454.

ner with his client. He cannot represent his client with the same freedom that he would if he had not that interest in the outcome of the litigation. The objection to the contingent fee is just there. We are in a position to take advantage of our client; we can make him think that the controversy is a very much more difficult one than we believe it to be. These are the dangerse of the contingent fee, but it is not an unlawful fee, it is dangerous because of the temptations which it presents.

The only justification for the contingent fee is that the client is, in many cases, either unable or unwilling to employ counsel to go forward with the litigation, since it may be of great length and involve considerable expense, and will only consent to an action being brought on the condition that he is only to be liable for services rendered in the event of recovery, and then only in a certain stipulated amount. If it were illegal for an attorney to accept such conditional or provisional compensation, it would in many cases make it impossible for an impecunious suitor to secure counsel to prosecute his just action for damages for personal injuries received through the negligence of some person or corporation.

## CHAPTER IV.

### OF THE ATTORNEY'S CONDUCT AND DEMEANOR TOWARDS THE COURT.

Sec. 2046. THE ATTORNEY'S RELATIONS WITH THE COURT IN GENERAL.—By the "court" in this connection is meant the judge, or judges, and jury who compose the court for the trial of litigated matters. There are many fine points of etiquette as regards the conduct of an attorney towards the judge and jury which each one must decide for himself, but as to the general conduct of the lawyer to the court there can be no question as to what it should be. The lawyer must not only demean himself as a gentleman, but as an officer of the court, and with all proper respect to the high official position of the judge, and the presumed unprejudiced character of the jury as judges of the facts in the litigation.

Sec. 2047. IN HIS RELATION WITH THE JUDGE IT IS THE OFFICIAL POSITION WHICH IS TO BE REGARDED RATHER THAN THE MAN.—An attorney-at-law, is a sworn officer of the court and as much bound to respect legal forms and observe the spirit of justice in his professional capacity in court as the judge. It is well to remember that a lawyer is an officer of the court, and with the

judge is engaged in the administration of law. He is really an assistant to correct conclusions of the court in the particular case in which he finds himself engaged. He must be faithful to the judge; not so much so to the man as to the officer. There is something that we owe to him and that we should always be regardful of. We cannot afford to put ourselves in a position of showing lack of respect. You find the bar of a particular court lacking in respect for the officer who presides there and you will find a bar which has not the respect of the community. I want to distinguish between the judge and the man. It is to be regretted that sometimes we may have little respect for the man himself, but the office is the same whether occupied by one man or another and that we always ought to show regard for.

Sec. 2048. IT IS THE DUTY OF AN ATTORNEY TO ALWAYS SHOW RESPECT TO THE JUDGE.—It is the province of the court to decide the legal points which arise in the progress of a litigation, and though sometimes unfit men are elevated to the position of judge, and their decisions show their unfitness, yet counsel are obliged to accept their rulings with respect as coming from the bench.

One of the indications that a man is a strong attorney is his ability to accept an adverse decision of the court. Here, particularly, if it is a controlling question in your case and you believe you are right, it takes a lot of grace to come to the decision that the

court is right in that declaration. After you have gone as far as you can reasonably and with dignity, accept the position of the court. It is very annoying many times to find an attorney who seems to disregard a decision of the court when made, which should control all that line of propositions which may arise by the presentation of other questions. I do not mean to say that the attorney may not show that the court has failed to appreciate the question before it. After other evidence is in, so that the bearing of the question may be better seen by the court, the attorney may compel the same line of evidence to be introduced again. Any attempt to take the court off his guard and get in evidence which the court has said is not competent is not proper practice for any one. Support the court in its rulings. It is your duty in the interests of public justice.

The influence upon popular opinion as to courts of justice by any lack of respect manifested by members of the bar towards the judge in the court room may be very serious; it may not only interfere with the administration of justice in a particular case, but affect the administration of the laws generally. As a member of the bar it is the duty of every attorney to see to it that all the formality and dignity customarily shown to judicial proceedings shall be strictly observed, and that the respect due to the high position of the presiding officer shall never be forgotten.

Sec. 2049. OF THE RIGHT OF AN ATTORNEY TO OPPOSE THE JUDGE.—It is your right

and duty as an attorney to present your view of the law to the court, and in so doing you will find yourself in many cases where you must very earnestly oppose the court. Your duty to your client sometimes requires you to make opposition to the court, but you can always do this and be respectful. This we should always keep in mind. One of the greatest of judges who has ever sat on the bench of the court of last resort, said this: "Aside from matters of reference to official duty, the judge is on a level with members of the bar and his fellow-citizens; his title to distinction resting upon no other foundation than his virtues and qualities as a man."*

Sec. 2050. IT IS THE DUTY OF AN ATTORNEY TO BE TRUTHFUL AND HONEST IN MAKING STATEMENTS TO THE COURT.—It is part of the obligation of the attorney as a sworn officer of the court and an important factor in the machinery of justice to be truthful and honest in his dealings with the court. And independent of this official obligation, it is our duty as members of the bar, to be truthful and honest in all our statements to the court.

If we make a statement of fact to the court, let it be certain that it is the fact. If it is not made on personal knowledge, let it be stated as on belief. We can give our source of knowledge. We cannot afford to let the court find out that we stated for a certainty

*Austin's Case, 5 Rawle, 204.

what we did not know to be a certainty. If we are presenting papers to the court, let us not present them unless we have confidence in them ourselves. If we have prepared the papers, this is certainly true. If they have been prepared by somebody else, we ought to have confidence in the source from which they come. We ought to bring to the court only that which we believe the court is justified in acting upon.

Sec. 2051. AN ATTORNEY SHOULD NOT FORGET THAT THE POSITION OF THE JUDGE IS FREQUENTLY A TRYING ONE.—Attorneys are apt to forget the flight of time in the trial of a law-suit, and when reminded of their tediousness by the court should not become offended. As Judge Lane remarks, "the position of a trial judge is a wearisome one, particularly in what we may call our country circuits. If he has any good measure of appreciation of the value of time spent in the court room, he must be continually in opposition, more or less, to those who are practicing before him. The attorney who is interested in his case may not notice the passing of time. The court is better able to appreciate that. In this way he may make himself disagreeable sometimes to practitioners."

Sec. 2052. OF THE CONDUCT OF THE LAWYER TO THE JURY.—It is the duty of the attorney, both as a member of an honorable profession, and as a sworn officer of a court of justice, not

to attempt to influence in any direct way the opinions of the jurymen. As an advocate, in court, in the trial of the suit, it is his duty and privilege to make his personality felt upon the jury, and to do his utmost to have the judge and jury see the real merits of his client's side of the litigation, and accept his view of the facts. But any underhand or unfair means to secure their favorable action, as by patronage, flattery or special friendship, is unprofessional conduct, and should merit the rebuke of the court, if not be taken into consideration on motion for a new trial.

Notwithstanding the evident impropriety, and questionable ethics of a fawning disposition towards the jury, it is becoming a common habit with certain members of the bar to depend upon winning their cases by ingratiating themselves with the jury, or selecting such persons whose friendship they can confidently rely upon to make them favorably disposed in the case, rather than submitting to an honest and fair trial of the issues upon the facts. The same thing may be said as to the judges being influenced by the position and standing of certain lawyers, rather than by the logic of their legal points. Perhaps nothing but the censure of an enlightened public opinion can put an end to such abuses, as it is said that a corrupt bar indicates a corrupt and corrupting people and community. Certain it is, that if a juryman, is honest, and has a decent respect for his oath, he cannot but

look with disfavor upon counsel who use such tactics to gain his favorable action.

In his lectures to law students, Judge Lane says: "Our influence, which is to be brought to bear upon the jurors, should be brought through the open avenue of the court. A lawyer who attempts to influence the jury outside the court is not fit for our profession. Some courts go very much further than others in their regulations and enforce strictly the rules which they make in respect to the relation between attorney and jurors. Jurors are not usually summoned for a particular case but for a whole term of court. They may be around the court house for several weeks and a person may ingratiate himself into the good graces of the jurors until he would have a great influence when he came to the trial of his case. This is entirely improper. You may not treat the jurors as you treat others who come into court. You not only should not deal with these as you would with an ordinary citizen in the court room, but you should keep yourself aloof from them. In any event, we ought not to put ourselves out of the way to talk to the jurors or invite them to our house or office. These attempts upon the part of the attorneys to reach the jurors for the purpose of putting themselves in a position where they may be stronger is entirely out of place. I have known cases where it seemed to me attorneys have sought to manufacture a favorable atmosphere about the court room by having their client bring a number of his friends to the court room to talk

favorably of his case. The attorney who would suggest such a thing is entirely out of his place; the client may not know any better. Even though this may be attempted, it is not always successful. Jurors are generally able to appreciate these things better than we think and if they find out that such a thing is being done, they are very naturally oposed to it."

## CHAPTER V.

### LEGAL STATUS OF THE ATTORNEY AS A MEMBER OF THE BAR.

Sec. 2053. OF THE RELATIONS OF THE ATTORNEY WITH MEMBERS OF THE BAR. —As a rule attorneys look upon their fellow members of the bar as professional brethren, and a friendly, rather than a strict code of professional etiquette governs their relations with one another. It sometimes happens that one or more members of the bar forget the courtesy and consideration due to their brother attorneys, and whether the oversight shall be ignored or met by retaliatory measures of the same kind and degree depends upon the circumstances of the case, as well as the temperament of the members slighted. It is certainly true that where an attorney persists in a line of objectionable conduct towards his fellow members of the bar, he may sooner or later expect to find that they will refuse to extend to him the favors customarily extended, and retaliate in some way for his slighting the professional code.

There are many ways in which an attorney may get in bad odor with his associates at the bar. Thus an attorney who fails to keep his word when given to another member of the bar in connection with a litigated matter need not feel slighted if fellow mem-

bers refuse to accept his promises thereafter. A matter which deserves professional rebuke, is the method followed by some attorneys of getting cases indefinitely postponed after they are ready for trial, on one or another excuse, even resorting to shamming indisposition in order to get a case continued. There are attorneys who also take delight in securing defaults, or snap-judgments upon their fellows, at every opportunity, although all the advantage that may be gained is making the other side some trouble in having it set aside. The conduct of an attorney in his daily life and in court may be overbearing, exacting and arbitrary to such an extent as to congeal all the fellowship and friendly feeling which the most genial hearted associate could have, and make the trial of a case with him, or against him a thing to be dreaded. Little is to be gained by any of these practices except the dislike of your associates, a thing to be avoided in any profession.

Sec. 2054. AS AN OFFICER OF THE COURT AN ATTORNEY IS SUBJECT TO CONTROL BY THE COURT.—It is to be remembered that the attorney is an officer of the court, and as such subject to the order of the court. Not that there are no rights of his which the court is bound to respect, and that he must obey its orders whether or no. But generally speaking he is subject to the order of the court as to his conduct, particularly in the court. For official misconduct—for misconduct of the attorney as such

—he is subject to punishment, and this may be of several kinds: a mere reprimand by the court; imprisonment, fine or even disbarment. Disbarment really is not by way of punishment, however; but the theory of disbarment proceedings is that it is for the purification of the bar itself; and we should not approach these proceedings from the point of view that they are for the punishment of the attorney. Of course it does operate as punishment and very severe punishment at that; but that is not the theory under which the court assumes jurisdiction in such cases.

Sec. 2055. WHEN THE COURT IS AUTHORIZED TO PUNISH AN ATTORNEY FOR IMPROPER CONDUCT.—It is stated by Judge Lane, that: "Any conduct on the part of the attorney, showing him to be morally unfit for the practice of the profession, will justify a court in administering punishment upon him of one sort or another. Not that anything he may do which is a breach of good moral conduct would justify such a proceeding—indeed, the general principle is more often stated that this conduct must touch him in his official character; but then I think that is not a correct statement. The theory I think which is adopted now is that, it being necessary that the attorney should have a good moral character, whenever it may be said that he has it not —and that may be evidenced by his conduct in other ways than as an attorney—it is ground for proceed-

ings of this sort, which may result even in his being disbarred from the profession."*

Sec. 2056. OF THE NATURE OF A DISBARMENT PROCEEDING.—The theory of a disbarment proceeding against an attorney is, that it is not to punish the offender for improper conduct, but to purify the profession and protect the administration of justice. It is therefore held, that while a conviction of crime may support a disbarment proceeding, it is not to be considered as a second punishment of the offence within the Constitutional provision forbidding that a person be twice punished for the same offence. The conviction establishing his guilt authorizes the court to act in shutting him out from the bar, even though he may have received all the punishment which the law provides for that crime.

It rests in the sound discretion of the court, where crime has been charged against one and disbarment proceedings are on, whether it will await conviction of the crime. There is no legal obligation to await even a criminal prosecution for that offence, even though the court may control that prosecution when it is brought to trial, and if the proper authorities should fail to start that prosecution the court should have it within its power to order that officer to do so. Nevertheless, he need not await the exer-

*The right of the court to punish an attorney is discussed in the following cases: Mills' Case, 1 Mich. 398; Weare's Case, 2 Q. B. 439; Ex Parte Brownsall, 2 Cowper, 829.

cise of that power: he may take up and hear proceedings to disbar one upon the ground that he is guilty of crime even though there be no prosecution or though there be one pending. But of course the court will ordinarily prefer to await the termination of the prosecution.

These proceedings of course are very serious. If they result in shutting one out they disbar him as a practitioner, and that may mean very much to him beside stopping him from the practice of his profession. It stamps him with a bad character in whatever business he may afterward engage, and therefore should never be undertaken without strong reason.*

It has been held that the right to practice law is so far considered as a property right, as to receive the same legal protection as other property, and hence it could not be taken away by statute, without the intervention of due process of law.** And it is not generally allowed to disbar an attorney on proceedings which are not commenced in some regular way, as by sworn charges preferred by some one who has knowledge.

But it has been held that where the conduct complained of takes place in the immediate presence of the court, the court may act upon the information which comes to it in that way; but even here the court

*In re Robinson, 19 Wall. 505.
**Ex Parte Garland, 4 Wall. 333.

should hesitate before passing an order depriving one of the privilege of practicing his profession without giving him an opportunity to be heard. There are almost always explanations of conduct which we do not expect in a man, and he ought to be heard before the court deals so seriously with him as to say he is not to practice his profession. And so it would seem the better practice, that even though the conduct takes place in the presence of the court the lawyer should be given an opportunity to answer charges formulated to the court by someone else.

Sec. 2057. DISBARMENT PROCEEDINGS ARE COMMONLY INSTITUTED BY THE LOCAL BAR ASSOCIATION.—Quite commonly proceedings of this sort are initiated by a committee or officers of the bar association, and yet in the absence of statute there is no legal duty upon the bar to commence proceedings of this kind. Of course there may be a moral obligation upon the bar to do so. It is a delicate thing for the judge to begin disbarment proceedings, because he then sits as judge in the prosecution of a proceeding which he himself has started.

Sec. 2058. OF THE PLEADINGS IN A DISBARMENT PROCEEDING.—The pleading ought to be substantially that which we find in a criminal prosecution: the setting out of definite charges against an individual in order that he may come in and answer specifically. Anything less than that seems to be not

*In re Wall, 107 U. S. 265.

quite fair; not within the spirit of our common law procedure.

This sort of showing being made, it is presented to the court and the court passes its order to the effect that a copy of this charge, with a copy of the order, be served upon the respondent and he be required to answer to these charges (usually in writing) at a day fixed in the order, at which time the respondent must come in with his showing and file it with the court; and upon the issue so made the hearing is had.*

The question is sometimes raised as to whether an attorney in a disbarment proceeding is entitled to a jury trial. As a rule it held that he is not entitled to a jury trial unless the statute providing for disbarment proceedings specifies that method of trial of the issue. By the weight of authority the Constitution alone does not confer the right to jury trial in such cases. The right to disbar an attorney for improper conduct is inherent in the court as essential to its proper regulation, and need not be given specifically by statute.**

Sec. 2059. OF THE ACTS FOR WHICH AN ATTORNEY MAY BE DISBARRED.—Among the acts and improper conduct for which an attorney may be disbarred, are the following: 1. Any conspiracy to defeat justice; such as subornation of witnesses, procuring of false affidavits, mutilation of records,

*State v. Kerr, 12 Fla. 278; 95 Am. Dec. 314 and note.
**Shepard's Case, 109 Mich. 631.

and the like. 2. Wilful disobedience of the court's orders, if it is such an order as the court had power to make. 3. Threatening to chastise the judge. 4. Improper and illegal advertising as to procure divorces in a certain way, and the like. 5. Obtaining money under false pretenses. 6. Committing any felonious crime. 7. Appearing in court with a deadly weapon with a design to use it. 8. A conspiracy to get an opponent intoxicated. 9. The disclosure of professional secrets, and the like.*

Sec. 2060. DISBARMENT PROCEEDINGS MAY BE REVIEWED ON ERROR.—In the state courts disbarment proceedings may be reviewed on error, but not in the federal courts. In the federal courts a review is obtained by mandamus, upon the theory that the court making the order of disbarment never had authority in the premises.

An order of disbarment may be vacated and the attorney re-admitted to practice in cases where the misconduct has not been too flagrant.

Sec. 2061. AN ATTORNEY MAY ALSO BE PUNISHED FOR CONTEMPT OF COURT.—A court has the unquestioned right to punish an attorney for disrespect or misconduct by fine or imprisonment or both. As a rule contempt proceedings are regulated by statute in the various states. A contempt proceeding differs from a disbarment proceeding, as

*See Philbrook's Case, 45 Am. St. Rep. 59 and note.

its purpose is to punish for the disrespect, and not merely to purify the bar.

Sec. 2062. AN ATTORNEY IS PRIVILEGED FROM ARREST WHILE ATTENDING COURT.—As an officer of court and connected with the administration of justice, the statutes usually exempt an attorney from arrest, and from being served with civil process, while in attendance at court, or while going to and returning from the trial of a cause. The purpose of such exemptions being to save a client from the loss of the services of his counsel when he is most needed.

Sec. 2063. COMMUNICATIONS BY A CLIENT TO AN ATTORNEY ARE REGARDED AS PRIVILEGED COMMUNICATIONS.—It is one of the rules of evidence that communications between an attorney and his client are privileged, that is they are not to be disclosed in court, or elsewhere, except by the consent of the client, who may waive the privilege. The waiving of the privilege by the client may be done in various ways; thus, either by expressly stating that he does waive it or by going on the stand and testifying without objection. The attorney himself cannot waive it, because it is not his privilege. Where the client has not waived it, it is the attorney's duty, when interrogated on this line, to ask the protection of the court as to its disclosure, and this protection will always be granted.

As to the application of the rule governing privi-

leged communications between attorney and client, Judge Lane observes: "There is some question as to whether it is really essential to this privilege, so far as the client is concerned, that the one to whom he makes the communication—the one whom he consults —should really be an attorney at law, or whether it is enough that he is acting as such? I think the general statement of the rule is that there must be that actual status: the attorney: one who is not only practicing because he is permitted without objection to practice, but he must be one who has the legal right to practice his profession. A consultation with one who might be trying cases in a justice's court is not a consultation within the protection of this rule.

"The cases are more difficult, however, when we come to consider that condition where a person is because of deception believed by the client to be an attorney when as a matter of fact he is not. I think it quite true that the general rule will put the client upon inquiry as to whether the one whom he consults as an attorney is really one or not; but if after using reasonable diligence and inquiry he is then justified, by reason of fradulent conduct on the part of the one whom he consults, then the question is a more difficult one. I think the general statement of the rule will be that where there are no positive steps taken by the one who is consulted to deceive the person who comes to him, the mere fact that the other believed him to be one will not put him where he may claim the privilege.

"You will find the rule stated generally that the client must at his peril know whether the person to whom he makes his communication is an attorney or not.

"This rule extends to communications made in good faith by the client to his attorney for the purpose of securing advice, or in furtherance of the object for which he is consulted—if the object is a lawful one. Where it is very clear that the client could not have had it in mind that the communication was essential to the advice which he sought, he will not be protected.

"This privilege also extends to communications made to third persons where that is necessary for the making of the communication. It does not extend to communications made in the presence of a third person whose presence is not necessary to the making of the communication. There is an exception to this where the communication is made, for instance, in the presence of a clerk or stenographer, whose presence is necessary in the ordinary conduct of the business, as where it is customary to have notes taken of such communications, etc.

"If the communication is made in the presence of both parties to the controversy, then there is no protection."

Sec. 2064. THE FREEDOM OF SPEECH VOUCHSAFED TO AN ATTORNEY IN THE ARGUMENT OF A CASE IS VERY BROAD.—The attorney is protected in the saying of things

which may go to the question of another's character, where a person not an attorney must answer. An attorney in the argument of a case to either the court or jury may with impunity say things respecting others, when if he spoke those things in his office or on the street he must answer for them. But this rule of privilege is not very clearly defined, though there are certain general principles laid down.*

We may state the general rule to be that the question in such cases is not whether the words spoken are true or whether they are actionable in themselves, but whether they are spoken in the court of judicial proceedings and whether they are relevant and pertinent to the subject of inquiry. The court will regard his conduct with some leniency, in view of the pressure which is always upon the counsel when he is in the heat of controversy. The limitation is this: The attorney shall not avail himself of his situation to gratify private malice or utter slanderous expressions which have no relation to the cause or subject-matter of the inquiry.

If we show that even though the attorney was in the heat of controversy the circumstances were such as that a person, even under those conditions, ought to have appreciated the fact that he was going outside his province as an attorney, then he must answer, because that is evidence of malice.

Sec. 2065. EXTENT OF THE AUTHORITY OF

*Hoar v. Wood, 3 Metc. 197.

## AN ATTORNEY TO REPRESENT HIS CLIENT.

As to the authority of an attorney to act in matters entrusted to him by his client, the rule is substantially this: That an attorney may do all the things which he deems to be necessary for the conduct of the business entrusted to him and which go to the securing of the remedy and not the cause of action itself. He cannot destroy, either in whole or in part, the cause of action of his client, unless he be expressly authorized to do that. Of course he may wipe out the cause of action by taking all that the client claims; but if he seeks to compromise litigation by accepting less than his client claims, and has not express authority to do that, he is answerable to his client for having done it. He cannot, even after recovery of judgment, discharge the judgment upon payment of less than the whole. He must secure all that the client claims or have special authority for accepting less. The defendant will not be protected by such a settlement.

An attorney cannot accept service of summons for his client unless he has authority. If his client has retained him to appear, of course he may do that even though the service has not been had upon his client. A general retainer does not go so far as to authorize an appearance.

The duration of the attorney's employment is controlled by the circumstance of the particular case, in the absence of express stipulations as to the time of the employment. Whether under a general employment in a case to procure a judgment for his client an

attorney has authority to take the necessary steps to secure a review in a higher court upon losing in the lower court, would depend upon the circumstances, and is sometimes incident to the general employment, but it is the general practice for an attorney not to take such steps without first consulting his client and getting his consent to the further employment.

Sec. 2066. AS TO THE LIABILITY OF THE ATTORNEY FOR COSTS INCURRED IN THE CLIENT'S BEHALF.—Is the attorney responsible for costs incurred in a litigation? An attorney goes into the clerk's office and takes out process to be served upon the defendant and upon witnesses: is the attorney responsible for the expense of all this? The general rule is that it must be understood that the attorney, when he goes in there, is acting for his client and that the clerk must look to the client for his fees and costs.

Sec. 2067. OF THE OBLIGATION OF AN ATTORNEY TO USE DILIGENCE AND SKILL IN THE HANDLING OF MATTERS ENTRUSTED TO HIM.—It may generally be said that he is under obligation to be reasonably diligent in the conduct of the business entrusted to him and to bring to it that skill which is common to members of the profession in that community. For example, he would be answerable to his client should he lay the cause of action in the wrong venue, under conditions where he could amend that, and the

statute of limitations should run against him. That illustrates the sort of diligence and care; as to the skill, suppose that instead of being an ordinary practitioner he holds himself out as a specialist: here he is not only held to the skill which is common to practitioners generally, but to the skill which is common to those who are engaged in the same general line with himself*

In general, it may be said that the attorney should be acquainted with the rules of practice of his court and with the general rules which are found in his statutes. Of course he may be wrong as to the construction of a statute; but if there is no question but that if a particular statute exists it will control the situation, then he must answer for ignorance of the existence of the statute.

Sec. 2068. AN ATTORNEY MAY REPRESENT A CLIENT BEFORE THE LEGISLATURE BUT CANNOT MAKE A LEGAL CONTRACT TO PROCURE SPECIFIC LEGISLATION.—An attorney who makes a contract to procure specific legislation is making a contract which the courts will not enforce, and it may be true that he cannot do this even though the legislation itself may not be harmful. It does not follow that he may not be employed to appear before the regular committees in the ordinary way and do that which as an attorney he may do if employed by the client in other business.

*Babbitt v. Bumpus, 73 Mich. 331.

Sec. 2069. OF THE ATTORNEY'S RIGHT TO A LIEN—RETAINING LIEN AND CHARGING LIEN.—An attorney is given a lien upon the property of his client connected with the litigation, to secure the payment of his fees and charges in the case. These liens are of two kinds:

1. A retaining lien. 2. A charging lien.

Sec. 2070. SAME SUBJECT—NATURE OF THE RETAINING LIEN.—The retaining lien is a lien which the attorney has on all papers and documents and property which come into his hands by virtue of his employment and not accidentally. This lien is for professional services and not to secure a general indebtedness which the client may owe to him. The costs and charges which he may have incurred while acting as attorney are within the provisions of this lien. It extends not only to services on the particular litigation in which the papers, etc., may have come into the hands of the attorney, but for all professional services which he may have rendered in any controversy. Of course its lien would not attach for anything beyond the interest which the attorney had in the paper or property: the interest of third persons, for instance. This lien is discharged by a voluntary surrender of that which is the subject of the lien.

Sec. 2071. SAME SUBJECT—THE CHARGING LIEN.—The charging lien is, on the other hand, a lien on all funds recovered through his agency, whether in court or elsewhere, and secures costs and

advances. The difference between this and the retaining lien is that the one secures compensation for all professional matters and for all costs and expenses connected therewith, while the other is confined to security for such services or such costs and expenses as were incurred in the particular matter in which they came to him. In some states the charging lien goes further than this and is construed not only to secure costs and advances, but as well the fees of the attorney. But it never reaches beyond the particular transaction.

Sec. 2072. SAME SUBJECT—EXTENT OF THE CHARGING LIEN, AND HOW IT IS DISCHARGED.—A transferee of a judgment, or of property upon which there is an attorney's lien, who takes with notice of the lien, holds such judgment or property subject to the lien.

So, if the attorney desires to assert his lein it is always a wise thing to notify the person against whom the judgment is obtained, that he will insist upon his lien upon the judgment, and so if there be payment of it after a notice of that sort his payment will not discharge the debtor so far as the amount of the attorney's lien is concerned. There are statutes in some of the states which control these liens, sometimes extending and sometimes limiting them; so always consult your own statute to discover whether there is a lien such as I have been speaking of, and if so, what its limitations are.

The particular lien is discharged in the same manner as the general lien—by a voluntary surrender of the property or thing which is the subject of the lien.

Sec. 2073. SOME REMARKS ON THE ADVANTAGES AND DISADVANTAGES OF PARTNERSHIPS BETWEEN ATTORNEYS IN THE PRACTICE OF LAW.—There are advantages and disadvantages in the formation of partnerships between attorneys for the practice of law. The personal element being the most important factor in determining the advisability of such a step on the part of an attorney.

As to the advantages: If you are able to make a connection with one who has an established practice, this does afford you an opportunity of getting at once into business. It is quite desirable many times that a young attorney shall be able to show the public whether he is worthy of success or not, and he can gain the opportunity more readily through a business connection with some attorney who has an established business. And even if you do not make a connection of that kind there are still advantages in partnerships composed of young men of varying talents—for instance, where one of them is better fitted to become a trial lawyer, the other better suited to office work—consultation, and the like. Two men thus supplementing each other can have a wider field of business than either could singly, in addition to the advantage which every partnership has, of being able to take care of

more business than a single individual can. But two persons may also make an admirable partnership when their talents are along similar lines. And then there is this advantage to every partnership: that by talking over a difficult legal proposition with someone else you are certain to get new light upon it, even though your partner be not as wise as yourself. In other words, two heads are better than one even though one of them is not sound. It is also sometimes an advantage to have someone else share the expenses of the business. And, of course, if your business connection is with an old practitioner you at once have the benefit of his experience and advice, which may be very valuable to you or, on the other hand, may be very detrimental.

As to the disadvantages of a legal partnership it is said by Judge Lane: "If there is any element essential to the development of a practicing lawyer, it is self-reliance, willingness and ability to assume responsibility; and this ability comes with the assumption of responsibility, and there is nothing else to take the place of this assumption; and the young lawyer, though he have gifts which might well make him one of the first in his profession, is quite apt, if he gets into the habit of relying upon the judgment of someone else, to carry that habit with him until he gets through with the practice of the law, and he will not be very successful when he gets through, either. Study the questions out for yourself: I wish I might make this emphatic. You never probably will forget the informa-

tion which comes as the result of hard work or digging for it. Again: it is true that the business relation of partnership puts us in a situation where we must answer (in law at least) for the conduct of our brethren who are related to us, and it is a responsibility which is often as effective upon you though you may not be called upon to answer as a matter of law. The moral responsibility for the conduct of your associate is quite as important an element to you as is the legal responsibility. If your partner is not careful of his integrity, or is careless about the money he collects, the public will generally blame you for it equally with him, and in the latter case, of course, the firm is legally responsible."

## CHAPTER VI.

OF THE ELEMENTS OF SUCCESS IN THE PRACTICE OF THE LAW.

Sec. 2074. OF THE DESIRABILITY OF AIMING AT SUCCESS.—One of the essentials to *success* is to have a healthy ambition to *succeed*. Such an ambition is often the most persistent stimulus to exertion and perseverance, by which the young lawyer can alone hope to win the laurel crown of success. No one, in this age and day, can claim to be born successful, or hope to discover any short cut or secret pathway not obstructed with obstacles which must be surmounted. There then must needs be, at the outset, an expectation to meet difficulties, and a determined and set purpose to overcome them. It is not in our power to point out all the obstacles which each individual will meet with in striving for success in the legal profession. Neither is it possible for us to indicate the countless factors or elements which may be said to be essential or necessary in the makeup of a successful lawyer. Such suggestions as we do give have been gleaned by experience or handed down by those who have passed on before and have left footprints for the guidance of others.

Sec. 2075. A LAWYER SHOULD AIM TO CULTIVATE A PLEASING AND ATTRACTIVE

MANNER AND APPEARANCE.—Frequently a man creates a prejudice against himself by his manner of action, of speech and the like. Frequently people have to overcome something which has grown up in their judgment of a man because of the first impression they got of him from his conduct. A man who comes into court with an air which repels everybody, naturally antagonizes everyone in the courtroom. But if you see a man come into the courtroom with a modest air, not lacking in dignity, not asserting himself by every motion which he makes, but seeming a man out of whom you must call that which you will find in him—then you have a man who, when he does speak, has your confidence at once.

Even in your opposition to the court—because sometimes you will have to oppose the court—you may, of course, have an attitude toward the court of one who is complaining or criticizing the court, and in a sense you may be justified in your criticism, and yet if you look at it from the standpoint of mere policy, you cannot afford to do that. You may with dignity maintain your position before the court and very courteously ask that you be heard upon the proposition and very earnestly insist that the court should change its views. But do this in the spirit of courtesy, not of criticism or complaint.

You should have, so far as possible, a pleasing manner of speech. There are some people you take pleasure in listening to, and others you take no pleasure in listening to, and it matters not that they use the same

language. Now I do not mean to say that you ought to be orators. I would much rather see most of you lawyers than orators. And so, if you have some graces of speaking, do not rely upon them. You must have something to say; that is quite true. And yet, on the other hand, it is quite as true that it is worth something for us to be able to say *well,* with a pleasing manner, that which we have to say.

The lawyer ought to have a reasonable command of language. Most of us have a good English education, but there are some of us who do not always use good English. If we can improve ourselves in that respect, we ought to do it, and it is coming to be more and more true that the juryman who sits in the box—even if he come from the plow—notices whether you use good grammar or bad in the courtroom—and those things affect the verdict.

The manner of saying a thing so that you evince a confidence in that which you say also makes very much difference many times in the effect of your speech upon the person listening to it. If you say a thing as though you were confident of what you are saying, you inspire confidence in somebody else, as you cannot if you have not that confidence. So I say, be earnest and show it.

The lawyer should have an outward appearance, as he speaks to men, which is attractive. He ought to have good power of expression. He ought to have earnestness. He must have a knowledge of legal principles. He ought to have a good share of learning

and of knowledge of the common affairs of life. He ought to have power to come to reasonably accurate conclusions as to men, and he ought to have a fair knowledge of himself—with his limitations. His judgment ought to be good, and ought to have common sense. These, with a good habit of industry and reasonable natural acquirements, ought to make a successful lawyer.

Sec. 2076. A LAWYER MAY BE A "TRIAL LAWYER," OR AN OFFICE LAWYER.—There are two classes of lawyers—the one we know as a "practicing," "litigating," or "trial lawyer"; and the other we know as an "office lawyer." There was a time when a man was not thought to be a real lawyer unless he was found in the courts. That time has passed. Unquestionably the lawyer who is earning most is not the man who is in the courts from day to day—it is the man who is found in his office and is doing his work as a lawyer there. But this course to which we shall direct our attention will deal more largely probably with the work of the trial lawyer.

It is true that the litigating lawyer is continually in a position where he is desiring to draw men to his own way of thinking. So that we can see at once that he must keep himself in a position where he will not antagonize but will naturally lead men to have confidence in him and his way of thinking.

An attorney may also be engaged in the general practice of the law, or have selected some branch of

jurisprudence as his specialty. The general practitioner—this is not so true of the specialist—is brought into contact with every phase of life in the community where he practices. He will be called upon to deal with all classes of persons, so that you can see that it is very desirable that the lawyer should be a man who is versatile so far as possible—able to adapt himself to conditions as they present themselves—able to understand men and conduct and to come to conclusions as to men and the effect of their conduct.

So it is true that the practicing lawyer will scarcely ever be called upon to give an opinion as a lawyer before he has gone out into some phase of life in which he has not been specially trained. So that the practitioner should be an observing man. He ought not to go anywhere without having his eyes open to the facts going on about him.

Sec. 2077. A LAWYER IN HIS ZEAL FOR HIS CLIENTS SHOULD NOT FORGET THAT HE MUST ALSO CULTIVATE FAIRNESS AND CANDOR.—A sense of fairness is a trait which no lawyer can afford to neglect.

Judge Lane, in urging law-students to cultivate candor, says: "It is true that an attorney may sometimes gain a temporary advantage by failing to exercise candor, but if we lack candor and continue to exercise our calling without it, we shall soon find ourselves short of the strength which otherwise we might have had. There is a temptation which comes to the practicing

lawyer and which comes scarcely so strong in any other field of human activity: a continual temptation to carry his cause a little farther than the facts behind him will justify. There is a pressure upon him to get all he can out of the situation, and that is, of course, a pressure which, if wisely guarded, can be made much of; but if the lawyer does not master himself when this pressure is upon him, so that he seeks to make more of the situation than the facts justify him in making, he will find himself contending in a way which will not cause him to win in the way in which he desires to win.

"For instance, in arguing before the jury the lawyer is naturally desirous of making all he can out of the facts, in the interest of his client. That is well. So far as he can, by all the power that is in him, it is his duty to make all out of the facts that they will bear in the interests of his client. But beyond that he never can afford to go. And yet sometimes, when he does not even intend to do it—and more often, I might say, than when he does intend to do it—the lawyer, carried away by zeal for his client, *is* going beyond this. It is coming to be more and more true that the juries before whom you practice are going to be able to appreciate whether you are exaggerating in the contention which you make. They will appreciate whether you have stated the testimony of a witness a little stronger than you are entitled to state it. And this by reason of the fact that the juries of to-day are more generally edu-

cated, more generally trained than were the juries of years ago. Once the lawyer establishes a reputation for going farther than he has the right to go, he has lost the most important element of strength he might have.

"Now, true as all this is in regard to juries, the jury is a changing body. You meet twelve men to-day in the jury-box of whom you may never again meet a single one. And if what I have said is true before such a body, how much more so is it of your attitude before the court. Here is the judge before whom you are to practice probably year after year, and if you once find yourself in such a position as that he may say to himself, 'I don't know whether this contention which is now being made before me is one upon which I can rely as being his honest conviction or not,' then you are weak, and always must be, before that court. I can assure you very positively indeed that when a court has to say of a man who is making a legal argument before it, 'I know that he believes in what he is saying,' that man is strong before the court, even though he lacks the ability of another man who has not that trait in his makeup.

"And a very important thing to be observed in this connection is that the ordinary juror is a man who thinks that he does not need the assistance of a lawyer very seriously. You find them saying often among themselves and to others about the court-room that they know how that case ought to be determined, they don't care to hear the arguments of anybody; or they

are continually complaining that the lawyer talks too long. This is not true of all juries, but it is a sentiment which you will find prevailing about the court-room very generally—the jury do not think that they need the assistance of the attorney. So you can see the importance of building up a reputation for entire candor when you come to address a body so apt to be prejudiced."

Sec. 2078. EARNESTNESS IS AN ESSENTIAL TO FORCEFULNESS IN A LAWYER.—The true lawyer ought to be earnest. You cannot be forceful unless you are earnest. One man may say the same thing that another does, and be heard, while nobody seems to know that the other has spoken; the difference being that the one has so spoken as to command a hearing and the other has not. Now this earnestness is ordinarily born of a conviction of the righteousness of our contention—not righteousness necessarily of our client's claim so far as the final outcome is concerned, but of the righteousness of the particular contention we are making at that particular stage of the trial. This earnestness may arise because you are impressed with the importance of your case—its importance to yourself personally, as regards your finances or your professional standing; its importance to your client—his life or his dearest interests may be at stake; or its importance to the general public—the far-reaching consequences of having the correct principle of law proclaimed in that case.

Now let me give you a caution: earnestness does not mean that we should be boisterous. Be earnest in a dignified way.

Sec. 2079. OF THE USE OF DIGNITY TO AN ATTORNEY.—Some personal dignity is essential to the make-up of a successful lawyer. Not that the lawyer is never to unbend—sometimes he is most effective when he has laid aside his serious expression; but after all it does not follow that when he is making light of his opponent he is lacking in dignity. He may be dignified and do that. I mean that he may make light of his opponent's argument or position; he can never afford to make light of the personality of his opponent, whoever he may be. But there is a measure of dignity which ought always to have, and by that I mean that he should always hold himself where, when his day's work is behind him and he can sit down by himself, he can respect himself. He cannot afford to be boorish; he cannot afford to be low in his language or in his conduct, but he must be able to so conduct himself that he can have his self-respect.

Now this dignity is born of an earnest desire to be measured at one's true worth. You should desire to have put upon you neither a higher value than you merit, nor a lower value; and it is more dangerous to you for people to get an overestimate of your real worth than an underestimate, because the time is certain to come when your real worth is discovered.

Avoid conduct and speech unbecoming a man who

appreciates that he is an officer of justice, as the practicing lawyer always will be. Many a man has marked himself, for good or ill, once and for all, by a single story that he has told or by a single argument that he has made.

Sec. 2080. A REASONABLE COMMAND OF LANGUAGE IS NECESSARY TO THE LAWYER.—A lawyer should have a reasonable command of language so as to express his ideas with clearness and precision and without hesitancy. This does not mean the use of mere ornate words, or figures of speech. He must have something else; but he must be able to express himself without always using exactly the same words. He ought to have a reasonably wide vocabulary, not of big words, but of the Anglo-Saxon words—the words of which nobody mistakes the meaning—the short, terse words. To acquire this there is no better method than to familiarize oneself with the masters of the English language and through them absorb their vocabulary so far as he is able to do so. This, of course, calls for what may be termed collateral reading, and reading of this kind is always a helpful exercise for the lawyer. If a man lacks forcible expression, let him study Carlyle, and he cannot help gathering something of the spirit of Carlyle, something of the mode of expression of Carlyle. If he lacks smoothness of diction, he can read some of the writers of more polite literature; but this is not often needed.

Sec. 2081. THE LAWYER MUST DEVELOP HIS REASONING POWERS, AND AIM TO CULTIVATE THE FACULTY OF BEING LOGICAL AS WELL AS FORCEFUL.—The logical faculty is nowhere more essential than in the practice of the law. This is true whether we are trying to establish conclusions of fact in the minds of the jury, or conclusions of law in the mind of the court. We ought to be able to reason well. This involves as well the synthetic as the analytic faculty. We ought to be able to separate a proposition into the elements which, combined, lead to that conclusion; and we ought, if we have those elements before us, to be able to put them together and reach the proper conclusion. We ought to be able to tell, when we have this fact and the other fact, what must be the conclusion from these, and then if we are to add another fact, what different conclusion we are to arrive at because of that third fact. The question arises whether this faculty can be acquired if we have it not. Now it is true that some minds will have this faculty very much more strongly developed than others, but it is also true that all of us may have this faculty developed in some good measure. We may train what elements we may have of it so that we may have a stronger ability along this line than we now have.

If I were to make any suggestions as to how we might cultivate this faculty of the mind, I would say: study some of the masters of reasoning. Study some of the masterpieces of argument, with the idea

of discovering where the strength lies. Take some of the arguments of Webster or Erskine, or some of the great opinions of Marshall, and see how it is they arrive at their conclusion. Or study the methods of some great lawyer in the courtroom whom you see making himself strong with the court. You will find that he generally does it by putting two and two together and coming to a conclusion as to how much they will make.

Sec. 2082. ALONG WITH HIS OTHER LEARNING THE SUCCESSFUL LAWYER SHOULD ACQUIRE A KNOWLEDGE OF MEN. —Perhaps in no other profession will a knowledge of human character and traits be of so much service as in that of law. The judge, the jury, the clients, and the witnesses all have to be studied and read by the astute lawyer.

The lawyer should, so far as in him lies, have an understanding knowledge of men. He is continually dealing with men in such a way that the better he understands men the more successful he will be. I might very nearly say that after you have been in the practice of the law for ten years, when you see a stranger called to the witness stand and you see him walk to the chair and take the oath and sit down, you ought then already to have a pretty good idea of that witness, as to whether he is a man in whom the jury ought to trust or not. That may be a little too strong, but there is a good measure of truth in it at least.

Pope tells us that the foundation of knowledge is to know ourselves, and so you will find it in this regard. The first essential to knowing men is to thoroughly know yourself.

*If a man finds that he is falling short* of what he is expected to accomplish in his profession, let him study himself and try to find out where the weakness lies. The trouble is that we do not give systematic study either to ourselves or to others; but we ought to.

Now it is exceedingly desirable that we should be able to understand the judge who tries our case, the attorneys engaged in it, the witnesses and the jury. After we have practiced a reasonably short time before a judge we ought to understand the type of man he is, what are his mental characteristics; how is an argument of this sort going to appeal to him; what is his attitude of mind toward this class of cases generally?

Similarly with the attorney on the other side. You ought to study your professional brethren, those with whom you contend oftenest. You ought to determine for yourself what they are going to do under these circumstances in this particular case. Hw is Smith going to try this case? How is he going to meet this question which is certain to come up?

Again: if you have a witness upon whose testimony a case hangs, you should be able to tell about how he will give his testimony and about what impression he will create. And you ought to know about how the attorney on the other side is going to handle

him, because of what you have seen him do to witnesses before. This is very important when you come to think of the witness and the part he plays in the trial of the case. Your own witness first: as you talk your case over with him and hear about him from others you ought to be making up your mind what sort of a direct examination you ought to give him, and you ought to have a reasonably accurate conclusion as to what he is going to do and how he is going to appear. If the witness is not your own and you see him for the first time, there ought to be but little doubt in your mind as to what you ought to do with that man, as one who is to cross-examine or refrain from cross-examining him. Sometimes a witness ought to make it very clear to you that the safest thing to do is to let that witness go without asking a single question. In another case it may be very clear that a rigid cross-examination of that witness is the proper course. But you are scarcely if ever justified in cross-examining a witness unless you have some very definite idea of why it is that you are conducting that cross-examination.

And then you must train yourself to read the jury. You are able to produce probably a stronger impression upon the juror by an argument you may make than upon the court. The court has had more experience, as it were. It becomes very important that you should understand these men who are to decide the questions of fact involved in your case. You ought to know the sort of homes out of which the jury come, what kind of lives they have been leading, their sur-

roundings past and present, and their habits so far as possible.

Sec. 2083. THE ATTORNEY MUST NOT STOP STUDYING THE PRINCIPLES OF LAW BECAUSE HE IS ADMITTED TO THE BAR, THIS IS A LIFE STUDY.—While a preliminary knowledge of legal principles is necessary to obtain admission to the bar, this is not the end of your studies in this respect. A thorough knowledge of legal principles includes a knowledge of the reason and spirit of the rule. A knowledge which lacks this is not knowledge which you can use with success. Mere ability to repeat a string of legal propositions will be of little use to you. You must be able to use your knowledge and apply it to the conditions in hand, to conditions which you have never before encountered or even read about, and you can never do that unless you have an understanding of the principles which you wish to apply. The acquirement of this, of course, means labor—labor during your entire professional career. You will be seeking this knowledge as long as you are engaged in the practice of the law. The lawyer of to-day must keep abreast of his profession. There is a growth, a development, in the law which will take all the time that you can give it, in order that you may be up-to-date.

Sec. 2084. OF THE ADVANTAGES OF GENERAL KNOWLEDGE TO THE LAWYER.—*MR. CHITTY HAS SAID*: "The student should study the

distinguishing temperaments and characters of mankind and biographical readings will greatly contribute to the same." And that is true.

Now in order to gain this knowledge of men we ought to know not only the men but the things in which they are interested as well. We ought to be reasonably well conversant with knowledge of all sorts. Take the lawyer who is expecting to try a litigation over a building contract. If he does not know the cornice of a house from the sills, etc., he is quite likely to find himself in a situation where he will be laughed at by the jury by reason of the mistakes he makes, and his force before them will be very largely lost. Similarly with any other line of knowledge. These bits of knowledge are lying all about us as we go along. I do not mean to say that we must make ourselves proficient in all branches of learning, but it is true that we ought to have such a general acquaintance with the more common branches of learning as that when somebody else who does know about them is talking we can understand what he means. Even where we are dealing with highly specialized subjects we ought, by special preparation, to know something about them when the trial begins.

A case never develops upon the trial just as you saw it in your office. New questions of fact or of law are bound to arise after the trial is begun, and we are not well able to contend unless we have a general store of information. "Hence

there should be no limit to the extended studies of a barrister."

Sec. 2085. THE SUCCESSFUL LAWYER MUST ALSO BE INDUSTRIOUS, ENERGETIC, TEMPERATE, PATIENT AND PERSEVERING. —The lawyer's calling is an industrious one. To be successful he must be industrious. This does not mean that he must be continually busy, or make unnecessary work, but without habits of industry he will slight important matters and soon retrograde instead of progress in his practice. The lawyer should be methodical in his labors, and by planning and classifying his work lessen it.

A lawyer must always be energetic and earnest in his work. Every case and every problem must be studied carefully with a view to master every detail. A lawyer must not only understand what he has in hand but must be able to make others understand; this means a more careful and accurate comprehension on his part. Superficiality will soon put an end to the success of any attorney.

The necessity of being temperate is overlooked by many lawyers, with great natural abilities and a fair show of success they allow intemperate habits of person and speech and manner to mar their otherwise useful and honorable lives. A man who cannot govern himself, cannot hope to govern or sway others, and yet it is not uncommon to hear those who are allowing their habits to unhorse them, contend that they are all

the more capable to win their way with others by reason of their intemperance. So easy is it for those who have lost dominion over themselves to be deluded as to their own condition.

The use of patience will be manifest to any one who observes the busy lawyer in the intricacies of an important case. Patience alone will sometimes be found to be the golden key which unravels the tangled skein of facts which surrounds an important matter.

Without question the first and last important requisite to a successful career at the bar, or anywhere else, is *perseverance.* Many persons who might have become able lawyers, and attained both fame and fortune in a vocation to which they were somewhat inclined, have failed, or given up, through want of perseverance at some critical moment. It is likely that they have, or will, also fail in other matters for the same reason. Again, when you have been admitted to the bar, and have been entrusted with a matter of litigation, whether of great or lesser importance, be persevering in mastering every detail of your case. In this way you will succeed while others fail. Perhaps you may lose your case, as you undoubtedly will lose some cases in your practice, but this should only stimulate you to further efforts to make up that wherein you find yourself to be lacking.

# QUESTIONS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

## PUBLIC INTERNATIONAL LAW.

### CHAPTER I.

1950. What may be said as to the existence of international rules with the Greeks? How were captives treated? Did the Greek writers mention the subject of International Law?

1951. Explain the status of International Law under the Romans. What was the *Jus Gentium* of the Romans? How was war declared?

1952. What may be said as to the Roman Civil Law? How was it made up?

1953. Describe the conditions existing in the middle ages as to International Law.

1954. What were the ameliorating influences from the tenth to the sixteenth century? Describe each fully.

1955. Explain the status of International Law in the sixteenth century. What events tended to assist the development of international regulations?

1956. When was the first book on International Law written? By whom was it written? Explain fully the method of treating the subject in this great work.

1957. Mention the other well known writers on International Law. What Americans have written books on the subject?

1958. What may be said as to the plan followed by the earlier writers on International Law? What writers seek to combine the earlier and modern methods?

### CHAPTER II.

1959. What rights are recognized as belonging to a state or nation? Resulting from these rights which are recognized by civilized nations upon what propositions does International

Law rest? Is this recognition of binding rules the result of legal or moral principles?

1960. What are the objections to the term "International Law"? What other terms have been suggested and used to designate the subject?

1961. Upon what sanctions does International Law rest? Describe fully.

1962. What other terms have been used to designate the subject now known as International Law?

1963. Into what branches is International Law divided? Describe each branch.

1964. How is International Law distinguished from the Municipal Law? To what extent are the principles of International Law recognized by the Municipal Law? What provision in the United States Constitution in this regard?

1965. What may be said as to the rules of International Law expanding? How is such a change made?

1966. What are the sources of the rules of International Law? Explain how International Law results from Treaties. Since what date have Treaties come to be regarded as a source of international law?

1967. What may be said of Manifestoes at the outbreak of a war as a source of International Law?

1968. What may be said as to Diplomatic Correspondence constituting a source of International Law? What are the government publications called in the leading countries?

1969. What are prize courts, and how are they constituted? What may be said as to prize courts and International Tribunals as a source of International Law? What may be said as to the establishment of a permanent International Tribunal?

1970. What other sources of International Law can you mention and describe? What were some of the early marine codes, and what effect have they had on modern marine codes?

## CHAPTER III.

1971. What is meant by a state? How does a state differ from a religious society or a corporation? What number of persons is necessary to constitute a state? What is the distinction between a state and a nation?

1972. What does international law recognize as to states?

1973. What is included in the recognition of the independence of a state?

1974. What is meant by territorial inviolability? Explain fully what is meant by the "marine belt," its extent, and the

different claims that have been set up in regard to it. What are the rights of a nation within its marine belt? Of other nations? What is the doctrine of international law in regard to the high seas? What is the rule as to gulfs, bays and straits?

1975. Discuss the right of a state to control its rivers. What questions arise where a river flows through two or more states? How are the questions answered? What was the controversy as to the navigation of the Mississippi and St. Lawrence? How were these controversies settled?

1976. Discuss the rights of a state over its canals.

1977. What rights has a state over its ships on the high seas, and what doctrine prevails as to ships on the high seas? What distinction as to the nature of the offence is made? What is the rule as to public vessels of a state within a foreign harbor? Who may punish acts of piracy?

1978. Discuss the right of a state to choose its own government. When a state changes its government may it repudiate its former debts? When may a state be interfered with as to its form of government? What is the theory of balance of power between European states? Was the act of Spain and France in setting up a government in Mexico justifiable?

1979. What may be said of the right of a state to self-preservation and protection? What steps may a state take to repel invasion? What did Canada do in this regard in 1837?

1980. Discuss the right of a state to acquire territory. May territory be ceded by one state to another?

1981. What may be said as to the right of a state to administer its domestic affairs?

1982. What may be said as to the right of a state to protect and extend its commercial development? What is meant by territory being within the "sphere of influence" of another state?

1983. Explain fully what is meant by the equality of states.

1984. Explain what is meant by dependent or protected states, and give examples.

1985. Explain fully how a new state or government may be recognized. Illustrate by examples. What is meant by a *de facto* government? When is a new goverment entitled to be recognized by other states?

1986. What distinction between recognizing the belligerent rights of insurgents and the recognition of their independence? What effect does the recognition of insurgents have on the liability of the parent state?

1987. Explain and discuss the origin, effect and application of the Monroe Doctrine, and what was claimed for it by the various public men. Has the doctrine ever been defined by Congress? Has it ever been expressly admitted or accepted by other nations? What is the purpose of the United States in asserting the Monroe Doctrine?

1988. What may be said as to the origin of the establishment of embassies and consulates? Name and describe the four orders of ministers. Is it imperative for a nation to send ministers? What distinction as to powers in the various orders of ministers? What is the method by which a minister communicates with the President in this country? What may be said as to the rights of a state to refuse to receive a particular person as minister or request his recall? Give examples illustrating this right. May women be ministers?

1989. What are the privileges and exemptions of ministers? What is meant by the theory of extra-territoriality? If a minister embarks in trade is such property exempt from taxation? What is the reason for giving a minister special immunities as to couriers and dispatches? What is the right of a minister to cross a third state in going to the state to which he is accredited?

1990. What is the importance of the consular bureaus at present? Explain the origin of consulates. What was the original functions of consuls? What is the obligation of a state to receive consuls? What may be said as to the immunities of consuls? With whom does the consul hold communication in the state to which he is sent? Who may act as consul?

1991. What are the duties of consuls? Describe fully. What other powers do consuls have in some of the original countries? Why? What may be said as to consular courts, and how they are conducted?

1992. What are the classes of consular offices maintained by the United States? What salaries are paid to consuls? What classes of this service are under civil service regulation?

## CHAPTER IV.

1993. What are the measures or restraint short of war which a state may adopt towards another state? Discuss and explain what is meant by "retorsion." By reprisals. What is meant by embargo or non-intercourse? When did the United States employ such acts towards other nations? Explain the

meaning and purpose of a pacific blockade. What is the purpose of retaliatory acts, and how may they be enforced? What is mean by quasi or limited war?

1994. Explain how claims or controversies between nations may be settled by arbitration or amicable settlement. When may a third state offer its services in the settlement of disputes between other nations?

1995. Define war, and give the meaning of what may be called the kinds of war.

1996. What may be said as to the commencement of a war? Is a declaration or notice necessary to the commencement of a war? What is meant by a manifesto? To whom is it usually addressed?

1997. When is it proper for other nations to recognize the belligerency of insurgents?

1998. Describe the effect and consequences under international law resulting from the recognition of the belligerency of insurgents.

1999. What is the effect of war and hostilities on existing treaties? What classes of treaties are not abrogated?

2000. What is the effect of war on the intercourse and commercial relations between citizens of the contending states?

2001. Who may engage in the war? How may volunteer troops be used?

2002. What rights have citizens of one country at war with another in the territory of the latter? What may be done with them at the outbreak of war? What becomes of their property?

2003. What sorts of property belonging to the enemy may be confiscated in war? How is this confiscation effected? Are public debts confiscable? Why?

2004. What is the effect of war on the commercial relations of the contending states, and what is the effect upon existing contracts? On contracts made during the existence of the war?

2005. What is meant by a privateer? Explain to what extent privateering has been abolished? Are we bound by the principles of the Declaration of Paris?

2006. Discuss what acts and practices may be done in carrying on war and what may not be done. When is the destruction of property justified? What acts are considered barbarous and inhuman in war?

2007. What may be said as to the use of deceit and strata-

gems in the conduct of war? What may not be done in this respect?

2008. What may be said as to the right to destroy or obstruct harbors in prosecuting a war?

2009. What classes of property may be seized on land in war times? What classes of property are usually exempt from seizure?

2010. What classes of property may be seized by the belligerents on the high seas? What change was made by the Declaration of Paris in this regard? Is the United States bound by this provision? What was the doctrine advocated by Mr. Marcy as to the exemption of neutral ships carrying private property of the belligerents? How is title to property at sea secured?

2011. What is the purpose of a prize court? What method of procedure is followed by them? What standing has the enemy in prize courts? Where may they be held? What is the rule as to allowing captured vessels in neutral ports?

2012. Explain and discuss the rights and duties of neutral states towards the belligerents in war. What is meant by neutrality? By permanent neutrality? What regulations as to the vessels of belligerents prevail under neutrality laws? What may a neutral state do towards aiding a belligerent? Towards furnishing arms and supplies? Making loans of money?

2013. What may be said as to the neutrality laws of the United States, their extent and acceptance by other nations?

2014. What acts may neutral nations do in regard to assisting suffering belligerents? To what extent may they furnish coal to war vessels, or sell arms and supplies? Sell or build war vessels?

2015. What determines the neutral character of property? What are the provisions of the Declaration of Paris as to the protection of neutral commerce? What contention do we make as to this?

2016. Discuss the rights of neutrals under the Declaration of Paris. What questions arise from our not having agreed to the provisions of the Declaration of Paris?

2017. What is included within the term contraband of war? From what did the doctrine as to contraband articles result? What is the penalty for a neutral ship carrying contraband articles to a belligerent? What is the penalty for carrying troops and hostile dispatches for a belligerent? Discuss the Mason and Slidell incident in our civil war?

2018. Explain the principles of international law in regard to the establishment and maintainance of a blockade of the ports of a belligerent. How is the fact of the blockade made known? What may be done with ships running the blockade? How far does the liability for running the blockade extend? What is the effect of the end of the war on ships in the blockaded ports?

2019. Explain and discuss the right of search. Did we ever recognize the right to search for and impress seamen?

2020. What do you understand by extradition? On what grounds is extradition of criminals based? Why do nations refuse to surrender refugees accused of political crimes? Does extradition prevail in the absence of treaty stipulations? When a claim for extradition is made to what department of the government is it referred?

# PART II.

# LEGAL ETHICS AND PRACTICAL SUGGESTIONS TO YOUNG LAWYERS.

## CHAPTER I.

2021. Discuss the meaning of ethics, and distinguish between ethics and morality. Define ethics as used in a limited sense.

2022. Why is ethics not an exact science? Is ethics a matter of pure morals and innate ideas or a process of development?

2023. Define legal ethics. Whose conduct is legal ethics concerned? What pre-eminent claim to obey the law is made upon all citizens? If ethics and the prescribed law seem to conflict which must be obeyed? Why?

2024. What classification of professional obligations may be made?

2025. What may be said as to the full extent of legal ethics? What is said by Judge Lane in this regard?

2026. What may be said as to the standing of the legal profession with the general public?

2027. What may be said as to the standing of the bar in America, in political and educational matters?

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2049. How should an attorney conduct himself in opposing the judge in matters in controversy?

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2052. Discuss and explain what should govern and regulate the conduct of the attorney towards the jury.

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2054. To what extent, and why is an attorney subject to regulation by the court? What is meant by a disbarment proceeding?

2055. When may the court punish an attorney for improper conduct? What sort of conduct is to be observed in this respect?

2056. Explain the nature of a disbarment proceeding, and when it should be begun? May such proceedings be conducted without due process of law?

2057. How are disbarment proceedings generally instituted?

2058. How are the pleadings in a disbarment proceeding commenced and made up? What sort of a trial is usually had?

2059. For what acts may an attorney be disbarred? What is the effect of disbarment?

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2084. How is general knowledge to the advantage of the lawyer?

2085. What is the use of temperance, patience and perseverance to the lawyer in gaining precedence on his profession?

# LATIN TRANSLATIONS.

*Juris præcepta sunt hæc, honeste vivere, alterum non lædere suum cuique tribuere. Inst.* 1. *i.* 3.—(The precepts of the law are these: To live honestly; not to injure another and to render to everyone his own.)

*In foro conscientiæ.*—(In the forum (or tribunal) of one's own conscience.)

*Quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*—(That which is natural and rational between all men constitutes the (basis or foundation of) law amongst nations.)

*"Jus civile est quod quisque sibi populis constituit."*—(The civil law is that which each people formulates (enact).

*Such laws among the Romans were denominated privilegia, or private laws, of which Cicero* (*de leg.* 3, 19, *and in his oration pro domo,* 17,) *thus speaks*: *"Vetant leges sacratæ vetant duodecim tabulæ, leges privatis hominibus irrogari; id enim est privilegium. Nemo unquam tulit, nihil est crudelius, nihil perniciosius, nihil quod minus hæc civitas ferre, possit."*—(The sacred laws forbid, the twelve tablets forbid that (retroactive) laws should be enforced against private individuals. This is a privilege (natural immunity). Nothing could be more cruel, nothing more pernicious; nothing could reflect more discredit upon the state.)

*"Esse optime constitutam rempublicam quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa."*—(That is the best republic which is moderately composed of these three basic principles.)

*Cunctas nationes et urbes populus aut primores, aut singuli regunt; delecta ex his et constituta republicæ forma laudari facilius quam evenire, vel, si evenit, haud diuturna esse potest." Am. l.* 4.—(The people either through chief ones or by the common people rule all nations and states; from this it may be inferred that the form so constituted is more easily lauded (praised) than effected, or if it does (eventuate) happen it will hardly long continue.)

*Lex pure pœnalis obligat tantum ad pœnam, non item ad culpam: lex pœnalis mixta et ad culpam obligat, et ad pœnam.* (*Sanderson de conscient, obligat, prael, viii Sec.* 17. 24.)—(Pure penal law applies only to the penalty and not to the fault (crime). The mixed penal law applies as well to the fault as to the penalty.)

*"Lex non exacte definit, sed arbitrio boni viri permittit."*—(A law not exacting (oppressive) but arbitrary operates to the best interest of the people.)

*Lex non scripta.*—(Law not (written) statute.)

*Lex scripta.*—(Statute (written) law.)

*Leges non scriptæ.*—(Laws not (written) statute.)

*Leges sola memoria et usu retinebant.*—(Laws known solely from memory and use.)

*Jus non scriptum.*—(A right (tacitly understood.)

*"Tacito et illiterato hominum consensu et moribus expressum."*—(Expressed by the tacit and unwritten consent of men.)

*"Omnibus qui republicæ præsunt etiam atque etiam mano, ut omnibus æquos se præbeant judices, perinde ac in judicali libro* (*Saxonice, dom-bec*) *scriptum habetur: nec quicquam formident quin jus commune* (*Saxonice, rolcnihcc*) *audacter libereque dicant.*"—(To all who are present in the Kingdom, and more particularly to the people at large, so that the judges may show themselves fair to all, hence it must be written in the (Dom Book) the judicial Book. Nor should they fear anything but the common law, and speak it fearlessly and freely.)

*Jus commune.*—(Common law.)

*"Viginti annorum lucubrationes."*—(Night work of 20 years.)

*"Legibus patriæ optime instituti."*—(Admirably enacted by the laws of our country.)

*"Si imperialis majestas causam cognitionaliter examinaverit, et partibus, cominus constitutis sententian dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causæ pro qua producta est, sed et in omnibus similibus."* *C.* 1. 14. 12.—(If his imperial majesty has taken judicial cognizance, and from the evidence adduced given his sentence (decision) every judge who is under our government shall know this to be the law, not only for the special case which brought forth the decision; but for all (subsequent) similar cases.)

*"Quod principi placuit legis habet vigorem, cum populus ei et in eum omne suum imperium et protestatem comferat."*—(That shall have the force of law which pleases the prince, when the people have conferred on him all its own supreme authority and power.

*"Imperator solus et conditor et interpres legis existimatur."*—(The Emperor alone is deemed both the builder (enactor) and interpreter of the law.)

*"Sacrilegii instar est rescripto principis obviari."*—(It is a resemblance of sacrilege to oppose the rescript of the prince.)

*Lex mercatoria.*—(Mercantile law.)

*"Cuilibet in sua arte credendum est."*—(Belief must be given to each one in his own domain.)

*Id certum est, quod certum reddi potest.*—(That is certain which can be proved.)

*Decemviri.*—(Ten men.)

*Responsa prudentum.*—(Replies of the learned.)

*"Tam immensus aliarum super alias ascervatarum legum cumulus."*—(Such an immense heap of laws piled up one upon another.)

*Corpus juris civilis.*—(Body of the civil law.)

*Corcordia Discordantium Canonum.*—(Agreement of dissenting canons (laws).)

*Decretum Gratiani.*—(Decree of Gratian.)

*Decretalia Gregorii Noni.*—(Decree of Gregory IX.)

*Sextus Decretalium.*—(Sixth book of the Decretals.)

*Extravagantes Joannis.*—(The wanderers of John.)

*Extravagantes Communes.*—(The common wanderers.)

*Corpus juris canonici.*—(The body of the canon law.)

*Leges sub graviori lege.*—(Laws under a more weighty law.)

*Articuli cleri.*—(Enactments for the clergy.)

*Prærogativa regis.*—(The prerogatives of the King.)

*Quia emptores.*—(Because buyers.)

*Circumspecte agatis.*—(Deal cautiously.)

*In perpetuum rei tetimonium.*—(For a perpetual testimony of the affair (thing).)

*Ut res magis valeat, quam pereat.*—(That the thing may prevail rather than perish.)

*"Leges posteriores, priores contrarias abrogant."*—(Laws more recent abrogate prior laws that contravene.)

*"Quod populus postremum jussit, id jus ratum esto."*—(That which the populace finally determines, let that be the ratified law.)

*Quoad hoc.*—(As far as this is concerned.)

*Sanctio justa, jubens honesta et prohibens contraria.*—(A righteous sanction, ordering that which is honest, prohibiting those things (against).)

*Facultas ejus, quod cuique facere libet nisi quid vi aut jure prohibetur. Inst.* 1. 3. 1.—(The opportunity which each one has to do that which is not prevented by force or by law.)

*Confirmatio cartarum.*—(Certified by the tablets.)

*Si aliquis mulierem pregnantum percusserit, vel ei venenum dederit, per quod fecerit abortivam; si puerperium jam formatum, fuerit, et maxime si fuerit animatum, facit homicidium. Bracton, l.* 3 *c.* 21.—(If anyone strikes a pregnant woman, or administers poison to her, through means of which an abortion occurs, if the fœtus is already formed, and particularly if it be *animated*, he commits murder.)

*Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur. Ff.* 1. 5. 26.—(Those things which are in the womb, are by civil law considered to be in the order of existing things when there is question concerning their welfare.)

*"Suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadera in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum."*—(Not the suspicion of a vain and timid man; but such as could befall a constant man: such should be the fear, which has in itself danger to life, or injury to body.)

*Ignoscitur ei qui sanguinem suum qualiter, qualiter redemptum voluit.*—(It is unknown to him what the value of his blood (life) is, what the value of its price.)

*"Desiit esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium."*—(He ceases to be a soldier of this world who becomes a soldier of Christ: nor should a benefice attach to him who is not obliged to discharge his duty.

*"Nullus liber homo, aliquo modo destruatur, nisi per legale judicum parium suorum aut per legem terræ." Aliquo modo destruatur."*—(No free man shall be destroyed in any fashion, save through the legal judgment of his peers, or by the law of the land.)

*"Dent operam consules, ne quid respublica detrimenti capiat."*—(Let the consuls give their aid, so that the republic may not suffer any detriment.)

*Senatus consultum ultimæ necessitatis.*—(The opinion of the senate for the utmost necessity.)

*De talliagio non concedendo.*—(Concerning aid that must not be given.)

*Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*—(We shall sell to no one for money, we shall deny to no one, nor shall we put off right and justice.)

*In bonis, in terris, vel persona.*—(In goods, in lands or in person.)

# MISCELLANEOUS LATIN LEGAL PHRASES.

**Contained in Books Nos. 1 to 9.**

A

*Ab initio.*—From the beginning.
*Aliunde.*—From outside.
*Alter ego.*—Another self.
*Animo testandi.*—The will to testify.
*Animus revocandi.*—The intention to recall or revoke.
*Animus testandi.*—The intention of testifying.
*Ante mortem.*—Before death.
*Assumpsit.*—He takes on himself.

B

*Bona fide.*—In good faith.

C

*Causa mortis.*—In case of death.
*Caveat emptor.*—Buyer beware.
*Certiorari.*—To be made more certain.
*Civiliter mortuus.*—Dead in the eyes of the law.
*Concilium privatum.*—Privy council.
*Contra.*—Against.
*Contra proferentum.*—Against the one offering
*Curia regis.*—King's Court (bench).
*Cy près.*—(Old French) as near as.

D

*De bene esse.*—Well being.
*De bonis non.*—Of the goods not yet administered on.
*De donis.*—About (concerning) gifts.
*De facto.*—From the fact; really; by one's own authority.
*De jure.*—By right.
*De non sane.*—(French) not of sane (mind).
*De son tort.*—(French) of his own wrong.

*Delectus personæ.*—At pleasure of the person.
*Delegatus delegare non potest.*—A delegate cannot delegate his authority.
*Descriptio personæ.*—Description of a person.
*Descriptio personarum.*—Description of persons.
*Do ut des.*—I give that you may go.
*Donatio mortis causa.*—Gift to be given in event of death.

E

*E converso.*—On the contrary.
*Ex contractu.*—According to contract.
*Ex delicto.*—From the crime.
*Ex parte.*—On one side only.
*Ex post facto.*—Coming after the fact. After the deed is done.
*Expressio unius est exclusio alterius.*—The claim of one excludes that of another.

F

*Facio ut des.*—I do that you may give.
*Facio ut facias.*—I do that you may do.
*Feme sole.*—(Old Norman French) Single woman.
*Fême covert.*—(Old Norman French) married woman.
*Fructus industriales.*—Industrial products.
*Fructus naturales.*—Natural products (fruits of the earth).
*Habeus corpus.*—To have the body.

I

*In futuro.*—In the future.
*In loco parentis.*—In the place of a parent.
*In personam.*—Against the person.
*In præsenti.*—At the present time.
*In re.*—In the matter of.
*In rem.*—Against the thing or property.
*In solido.*—In bulk.
*In transitu.*—On the passage (in transit).
*Inheres.*—Within itself.
*Inter vivos.*—Among the living.
*Ipso facto.*—In the fact itself.,
*Ipso facto et eo instante.*—By the act instanter.

J

*Jura personarum.*—Rights of persons.
*Jura rerum.*—Rights of things (or property).
*Jura summi imperii.*—Laws of the supreme authority.
*Jus despondi.*—Law of transfer.

L

*Lex domicilii.*—Law of habitation.

*Lex rei sitæ.*—Law of a stationary thing. The site of a thing.

*Locus pœnitentiæ.*—Place for repentance.

M

*Malum in se.*—Bad in itself.

*Mandamus.*—We command.

*Municipium.*—Municipality.

*Ne exeat.*—Let him not depart.

*Ne exeat regnum.*—Not to leave the Kingdom.

*Nemo plus juris ad alium transferre potest quam ipse habet.*—No one can give more rights to another than he himself has.

*Non compotes.*—Not competent.

*Non compos mentis.*—Not of sound mind.

*Non haec in fœdera veni.*—These are not in the compact.

*Nudum pactum.*—A mere agreement. Contract without consideration and therefore void.

*Nunc pro tunc.*—Now for then.

O

*Obiter dictum.*—Anything said by the way, or in passing.

P

*Per capita.*—By the head (according to or counted by heads).

*Per se.*—By itself considered.

*Per stirpes.*—Through descent (posterity).

*Per testes.*—By witnesses.

*Post mortem.*—After death.

*Prima facie.*—On the first view.

*Præmunire.*—To be forewarned.

*Pro rata.*—In proportion.

*Pro tanto.*—For so much.

Q

*Quantum meruit.*—As much as he deserves.

*Quasi.*—As if.

*Qui facit per alium facit per se.*—Who acts through another acts for himself.

*Qua warranto.*—By what authority.

*Quod non habet.*—What one has not.

R

*Rerum natura.*—Natural things. (Products of nature.)
*Res gestæ.*—Exploits. (History.)
*Respondeat superior.*—Let the superior one reply.

S

*Scire facias.*—Cause it to be known.
*Se defendendo.*—In self-defense.
*Simplex commendatio non obligat.*—An ordinary statement is not binding.
*Statu quo.*—The state in which (it was).
*Status quo.*—The state in which.
*Sub anno.*—In the year of.
*Subpœna.*—Under penalty.
*Sui generis.*—Of its own kind.
*Sui juris.*—In one's own right.
*Supra.*—Above.
*Supra protest.*—Above protest.

U

*Ultra vires.*—Beyond the power.

V

*Versus.*—Against.
*Vice versa.*—The terms being exchanged. (reversed).
*Viva voce.*—By oral testimony (human voice).

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